

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 309

WILLIAM H. DANFORTH, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 11,255
AT LAW.

WILLIAM H. DANFORTH, APPELLANT,
vs.
UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JULY 15, 1938.

INDEX.

	Original	Print
Citation and Service.....	2	1
Caption to Transcript from United States District Court.....	3	2
Petition.....	4	2
Interlocutory Order and Order appointing Commissioners.....	63	11
Report of Viewers.....	78	15
Exceptions of Plaintiff to Report of Viewers.....	81	16
Exceptions of Defendant, William H. Danforth to Report of Viewers.....	83	18
Order granting leave to William H. Danforth to file Answer and Cross-Bill.....	86	20
Application of William H. Danforth for dedimus to take Depositions.....	87	20
Answer and Counter-Claim of William H. Danforth.....	89	21

	Original	Print
Stipulation extending time for taking Depositions, etc.....	95	26
Motion of Plaintiff to strike Answer and Counter-claim of William H. Danforth, etc.....	97	27
Notice of Motion of William H. Danforth for leave to amend Exceptions to Report of Viewers.....	103	32
Motion to amend Exceptions.....	104	33
Order of submission of Motion of William H. Danforth for leave to amend Exceptions to Report of Viewers.....	107	36
Opinion and Order on Motion of William H. Danforth for leave to amend Exceptions to Report of Viewers.....	107	36
Order sustaining Motion of Plaintiff to strike Answer and Counter-Claim of William H. Danforth.....	110	39
Memorandum.....	111	39
Motion of William H. Danforth to vacate Award of Viewers, to set aside Findings of Fact, Interlocutory Decree and Appointment of Viewers and for Judgments, etc.....	116	41
Letter, Brehon Somervell to W. H. Danforth, January 14, 1932...	118	43
Letter, Brehon Somervell to W. H. Danforth, January 14, 1932...	119	44
Term Bill of Exceptions.....	122	46
Caption.....	122	46
Motion of Plaintiff to strike Answer and Counter-claim of William H. Danforth, etc., Memorandum as to.....	122	47
Recital as to sustaining of Motion of Plaintiff to strike Answer and Counter-claim of William H. Danforth, etc.....	122	47
Approval of Term Bill of Exceptions by District Judge.....	122	47
Term Bill of Exceptions.....	123	47
Caption.....	123	47
Motion of William H. Danforth for leave to amend Exceptions to Report of Viewers.....	123	47
Recital of Order on Motion to Amend.....	123	47
Approval of Term Bill of Exceptions by District Judge.....	123	47
Motion of William H. Danforth for leave to amend Motion to vacate Award of Viewers.....	124	48
Order granting leave to William H. Danforth for leave to amend Motion to vacate Award of Viewers.....	125	49
Order overruling Motion of William H. Danforth to vacate Award of Viewers, to set aside Findings of Fact, Interlocutory Decree and Appointment of Viewers, and for Judgments, etc.....	125a	49
Stipulation that Memorandum filed October 12, 1934 may be corrected.....	126	50
Order of District Court sustaining Exceptions of Plaintiff to Award of Viewers as to Tracts Nos. 243 and 281, etc.....	127	50
Term Bill of Exceptions.....	130	52
Caption.....	130	52
Motion of William H. Danforth to vacate Answer of Viewers to set aside Findings of Fact, Interlocutory Decree, and Appointment of Viewers, and for Judgments, etc., and Order overruling same, etc.....	130	52
Recital of Order of District Court sustaining Exceptions of Plaintiff to Award of Viewers as to Tracts Nos. 243 and 281...	130	52
Approval of Term Bill of Exceptions by District Judge.....	131	52
Order of District Court appointing new Commissioners as to Tracts Nos. 243 and 281, April 10, 1936.....	132	53

Recital that record does not show filing of Exceptions of William H. Danforth to Order appointing Viewers.....	135	54
Report of Commissioners as to Tracts 243 and 281.....	136	54
Renewal of Motion of William H. Danforth to vacate Award of Viewers, to set aside Findings of Fact, Interlocutory Decree, and Appointment of Viewers and for Judgment, etc.....	141A	56
Recital as to filing of Motion, argument thereof and overruling thereof.....	141A	56
Exceptions of William H. Danforth to Report of Viewers.....	142	57
Letter, Brehon Somervell to W. H. Danforth, January 14, 1932..	143	58
Recital that Record does not show filing of Term Bill of Exceptions following Motion filed August 5, 1936.....	147	61
Recital of Resubmission to Court of Motion of William H. Danforth for Judgment and overruling thereof.....	148	61
Order sustaining Exceptions of William H. Danforth for the reason that the award is inadequate.....	149	61
Order of District Court appointing new Commissioners as to Tract No. 243 filed November 28, 1936.....	150	62
Recital that Record does not show filing of Term Bill of Exceptions filed November 30, 1936.....	153	63
Report of Commissioners as to Tract No. 243.....	154	63
Exceptions of Plaintiff to Report of Viewers as to Tract No. 243..	157	65
Exceptions of William H. Danforth to Report of Viewers as to Tract No. 243.....	160	68
Letter, Brehon Somervell to W. H. Danforth, January 14, 1932...	161	69
Letter, Brehon Somervell to T. R. Roe, February 11, 1932.....	162	70
Findings and Judgment of District Court relating to Tract No. 243, April 23, 1937.....	167	73
Record entry of setting aside Award of First and Second Commissions; Exceptions to award of Third Commission overruled..	183	79
Record entry of filing of Motion of Plaintiff for new Trial.....	183A	80
Motion of Plaintiff for new Trial as to Tract No. 243.....	184	80
Record entry of filing of Motion of William H. Danforth for new Trial.....	188A	84
Motion of William H. Danforth for new Trial as to Tract No. 243..	189	84
Letter, Brehon Somervell to W. H. Danforth, January 14, 1932..	190	85
Letter, Brehon Somervell to T. R. Roe, February 11, 1932.....	191	86
Disclaimer of Northwestern Mutual Life Insurance Company, and Petition for dismissal of Proceedings, etc.....	195	89
Order overruling Motions of Plaintiff and William H. Danforth for new Trial.....	198	92
Petition for Appeal.....	199	92
Assignment of Errors.....	200	93
Order allowing Appeal, etc.....	209	100
Bond on Appeal.....	210	101
Order, February 26, 1938, extending time to file Bill of Exceptions, etc.....	212	102
Order, March 15, 1938, extending time for William H. Danforth to file Praecept for Transcript.....	213	102
Order, March 22, 1938, further extending time for William H. Danforth to file Praecept for Transcript.....	214	103
Order, March 22, 1938, further extending time to file Bill of Exceptions and extending time to file Transcript.....	215	103

Order, March 30, 1938, further extending time for William H. Danforth to file Praecipe for Transcript.....	216	103
Stipulation that Motions for new Trial may be considered as part of Bill of Exceptions, etc.....	217	103
Stipulation that Plaintiff may have additional time for filing Counter-Praecipe for Transcript.....	218	104
Stipulation for further extension of time for filing Bill of Exceptions and Transcript, etc.....	219	104
Stipulation as to time for filing Objections to Bill of Exceptions by Plaintiff.....	220	105
Order, April 23, 1938, extending time for Plaintiff to file Objections to Bill of Exceptions and further extending time to file Bill of Exceptions and Transcript.....	221	106
Order, May 23, 1938, further extending time to file Bill of Exceptions and Transcript, etc.....	222	106
Stipulation for further extension of time to file Bill of Exceptions and Transcript.....	223	106
Record entry of filing of Bill of Exceptions.....	224	107
Bill of Exceptions.....	225	107
Caption.....	225	107
Renewal of Motion of William H. Danforth for Judgment, etc., and overruling thereof.....	225	107
Recital as to papers omitted from Bill of Exceptions because they are not relevant nor pertinent, etc. to Appeal.....	226	108
Renewal of Motion of William H. Danforth for Judgment and overruling thereof.....	226	108
Testimony for Plaintiff.....	227	109
T. T. Knappen.....	227	109
L. T. Berthe.....	231	112
Testimony for Defendant, William H. Danforth.....	231	113
James J. O'Connor.....	231	113
Objections of Plaintiff to jurisdiction of Court to hear or determine matter under Counterclaim, etc., and overruling thereof.....	232	114
Major General Edward M. Markham.....	233	114
Defendant Danforth's Exhibits.....	236	117
B, Request to Secretary of War by General Brown for authority to make settlements of flowage easements... Press release.....	236	117
A, Instructions from War Department relating to offers for flowage in New Madrid Floodway, etc.....	238	121
Objection of Plaintiff to offer of Exhibits.....	244	133
C, Instruction from War Department relating to offers for flowage in New Madrid Floodway, etc., April 4, 1932. Statement relating to Flowage cases of New Madrid Floodway where offers were considered excessive, etc.....	248	137
Patrick J. Hurley.....	251	158
Major Brehon Somervell.....	261	160
Defendant Danforth's Exhibits.....	263	162
D, Letter, Edwin C. J. Iton to Wm. H. Danforth, November 16, 1932.....	263	162
E, Letter, Brehon Somervell to W. H. Danforth, January 14, 1932.....	267	165
F, G and H, Memorandum as to.....	269	167

I, Letter, Brehon Somervell to Wm. H. Danforth, April 25, 1932.....	270	168
J, Letter, Brehon Somervell to Wm. Danforth, April 25, 1932.....	271	169
K, Letter, Brehon Somervell to T. R. Roe, February 11, 1932.....	273	171
L, Letter, Brehon Somervell to Wm. H. Danforth, April 26, 1932.....	275	173
M, Letter, Brehon Somervell to Wm. H. Danforth, November 7, 1932.....	276	174
X, Letter, Brehon Somervell to Francis-Ralph Realty Company, April 15, 1932.....	278	176
Y, Letter, Brehon Somervell to Francis-Ralph Realty Company, January 8, 1932.....	279	177
Z, Letter, Brehon Somervell to Wm. H. Danforth, April 25, 1932.....	281	179
N, Letter, Brehon Somervell to Wm. H. Danforth, July 8, 1932.....	288	185
Arthur W. Swacker.....	290	187
G. W. Miller.....	290	187
L. T. Berthe.....	292	189
Proclamation of President relating to Act for Control of Floods on Mississippi River, etc.....	299	193
Certificate of Assessor of Mississippi County, Missouri, relating to assessment on certain lands.....	301	195
G. W. Miller, recalled.....	301	195
Colonel Eugene Reybold.....	303	196
Major R. D. Burdick.....	308	201
Recital that Record contains all of the evidence.....	310	202
Record entry of setting aside Award of First and Second Commissions; Exceptions to Award of Third Commission overruled.....	311	202
Findings and Judgment as to Tract No. 243.....	312	203
Stipulation that Motions for new Trial may be considered as part of Bill of Exceptions, etc.....	320	210
Recital and overruling of Motions for new Trial.....	321	211
Approval of Bill of Exceptions by District Judge and Counsel.....	322	211
Præcipe for Transcript.....	322	212
Clerk's Certificate to Transcript.....	327	216
Ruling of District Court on Exceptions to Awards.....	217	217
Order of District Court for Certification of Ruling on Exceptions to Awards to Appellate Court.....	218	217
Certificate of Clerk of District Court to additional matters.....	219	218

	Original	Print
Proceedings in U. S. Circuit Court of Appeals.....	219	219
Appearance of Counsel for Appellant.....	219	219
Appearance of Mr. L. John Weber and Mr. Harry C. Blanton as Counsel for Appellee.....	219	219
Appearance of Mr. Charles R. Denny, Jr., as Counsel for Appellee.....	220	219
Appearance of Mr. Thomas E. Harris as Counsel for Appellee.....	220	220
Order of Argument, November 15, 1938.....	220	220
Order of Submission, November 16, 1938.....	221	220
Opinion on First Submission.....	222	221
Judgment, Vacated March 24, 1939.....	231	229
Petition of Appellee for Rehearing.....	232	230
Order Granting Petition for Rehearing, etc.....	236	232
Order of Submission, May 12, 1939.....	237	233
Opinion on Second Submission.....	238	233
Judgment, July 11, 1939.....	245	239
Motion of Appellant for Stay of Mandate.....	246	240
Order Staying Issuance of Mandate.....	247	241
Clerk's Certificate to Transcript.....	248	241
Order allowing certiorari.....		242

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1939, of said Court, before the Honorable John B. Sanborn, and the Honorable Seth Thomas, Circuit Judges and the Honorable George F. Sullivan, District Judge.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the fifteenth day of July, A. D. 1938, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein William H. Danforth was Appellant and the United States of America was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

(Citation and Service.)

(Filed February 26, 1938.)

The United States of America

to United States of America—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, St. Louis, Missouri, forty days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein William H. Danforth is appellant in error, and you are appellee to show cause, if any there be, why the judgment rendered as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties that behalf.

Witness, the Honorable, Judge of the District Courts of the United States for the Eastern District of Missouri, this 26th day of February, in the year of our Lord one thousand nine hundred and Thirty-eight.

CHARLES B. DAVIS,
United States District Judge, for
the Eastern District of Missouri.

Copy received February 26, 1938.

HERBERT H. FREER,
Assistant United States Attorney.

L. JOHN WEBER,
Special Attorney, Department of Justice.

Endorsed: Filed in U. S. District Court on February 26, 1938.

2

DANFORTH VS. UNITED STATES OF AMERICA

3

United States District Court for the Southeastern
Division of the Eastern Judicial District of
Missouri.

United States of America, Plaintiff,
No. 716. vs. At Law.

Beatrice McDaniel, William H. Danforth, Wilbur E. Hoag,
as Trustee for the Northwestern Mutual Life Insur-
ance Company, et al., Defendants.

Tract No. 243.

Be It Remembered, that heretofore, to-wit; on the 11th
day of April, 1938, there was filed in the office of the Clerk of
said Court in the above entitled cause, a certain praecipe for
transcript on appeal from said Court to the United States
Circuit Court of Appeals for the Eighth Circuit, which said
matters as set out in said praecipe, except as herein noted, to-
gether with such papers as have been filed in said cause since
the filing of said praecipe and as requested by the attorney
for the appellant be [includ] in said transcript, are as fol-
lows, to-wit:

4

Petition.

Filed September 25, 1933.

Tracts Nos. 282, 306, 246, 256, 259, 266, 250, 347, 247, 187, 281
and 243.

In the United States District Court, Eastern District of Mis-
souri, Southeastern Division.

United States of America, Plaintiff,
Docket No. 716. vs.
Beatrice McDaniel, Poplar Bluff, Missouri;

.

7

William H. Danforth, St. Louis, Missouri;

Wilbur E. Hoag, as trustee for the Northwestern Mu-
tual Life Insurance Company, a corporation, in
a certain deed of trust dated May 28, 1920 and
filed June 8, 1920 in book 69 at page 118 of the
records of Mississippi County, Missouri, and
given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corpora-
tion, as cestui que trust in the above mentioned deed
of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

10

Defendants.

The United States of America, the plaintiff herein, by Louis H. Breuer, United States Attorney for the Southeastern Division of the Eastern Judicial District of Missouri, for the cause of action alleges that the plaintiff herein, the United States of America, is and at all times and dates hereinafter mentioned was a corporation sovereign; that the defendants herein are the owners of the real estate in this petition described, and have an interest therein as herein set out, and have claims thereupon either as tenants, mortgagees or bondholders, secured by mortgage or deed of trust upon the said premises, and by special tax liens by levee and drainage districts.

2.

That the real estate as hereinafter described is located within the State of Missouri, and within the jurisdiction of

the United States District Court, in and for the Eastern District of Missouri, Southeastern Division.

3.

That this is an action having for its purpose, among other things, the acquiring by condemnation, of a perpetual easement over and across certain real estate located as in this petition described and is authorized and directed to be brought by the Secretary of War, pursuant to the act of May 15, 1928, known as "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for other purposes."

4.

That the project herein referred to and the matters to be performed, being in the interest of national prosperity, the flow of interstate commerce, and the movements of the United States mails, and the conserving and controlling of flood waters of a volume and flowing from a drainage area largely outside of the states most affected in the alluvial valley of the Mississippi, the jurisdiction and control of the subject matters herein are within the purview of the sovereign plaintiff and the Congress of the United States.

12

5.

That on the 15th day of May, 1928, an Act entitled, "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for other purposes", became effective as a law of the United States, and was designated as Chapter 569 of the United States Statutes for 1927-28; that said Act included as a part thereof and incorporated therein the following:

6.

"That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers," subject to certain exceptions and limitations in said Act prescribed.

7.

That the said project for flood control of the Mississippi River above referred to, in accordance with the engineering

plan set forth and recommended by the Chief of Engineers in said report submitted to the Secretary of War, under date of December 1, 1927, was thereafter approved by said Secretary of War, and was adopted and incorporated in said act of May 15, 1928, Chapter 569, Which Plan Contemplates And Provides For, among other things, the construction of levees and the Acquisition Of Flowage Rights For Additional Destructive Flood Waters that will pass by reason of diversions from the main channel of the Mississippi River; the acquisition of such flowage rights by purchase or condemnation; for the lowering of the present river bank levee to a grade equal to the flow line of fifty-five feet on the Cairo
13 gauge, beginning at a point approximately one mile East of the highway bridge, Birds Point, and thence South about eleven miles, so that when the stage at Cairo reaches fifty-five feet, water from the main channel of said river will be permitted to pass over or through said river bank levee at the point above named and overflow the land, and through the territory embraced between the present river side levee on the East, as now constructed, and the levee in process of construction from the vicinity of Birds Point, Southwest to St. Johns Bayou, just East of New Madrid on the West, known as the set-back levee, and thence again into the main channel of said river; that the territory above described and embraced between the aforesaid levees is designated as the Floodway Area; that although the said Floodway Area will be subjected to the servitude above described, the land in the said Floodway Area between the new levee and present river bank levee, other than the back water area of St. Johns Bayou, will be protected against all stages of record except those of 1927; that said Area is more definitely defined, described and shown by maps, plats and charts heretofore filed with the Clerk of this Court and to which reference is herein had, and made a part hereof as if specifically attached hereto; that reference to the same is had in House Document 90, and was specifically designated by the Chief of Engineers and such designation approved by the Secretary of War and confirmed by executive order of the President of the United States; that the frequency and duration of such flow of water as well as the depth thereof on the specific land hereinbefore described, at the time of such overflow, this plaintiff is unable to state.

8.

That for the purpose of carrying that part of the project into effect dealing with the diversion of the additional flood

14 water from the main channel of the Mississippi River as contemplated by House Document 90 and provided for in Chapter 569 above referred to, it is essential that the plaintiff herein acquire a full, complete and perpetual right, power easement, and privilege to overflow, as contemplated by said project, and as described in House Document 90, the above designated flood area, of which the lands herein described form a part thereof; that the said lands and territory necessary for the purpose aforesaid are located in certain parts of Mississippi and New Madrid Counties, Missouri, and within the jurisdiction of this Court.

9.

That the said proposed floodway as designed and herein described is upon, over and across lands not now owned or controlled by this plaintiff, but owned and controlled by many and sundry individuals, persons, firms and corporations, and located within the State of Missouri and within the jurisdiction of this Court; that the Secretary of War is empowered and authorized to institute or cause to be instituted such proceedings as may be necessary to Acquire Said Easement for the completion of said project, and that this Court has jurisdiction of all proceedings, suits or actions designated and intended for such purposes.

10.

That the Following Lands hereinafter described in this petition, and as described, are included within the aforesaid territory; and that it is the opinion of the Secretary of War and the Chief of Engineers that it is necessary and advantageous to the interests of this sovereign plaintiff and the carrying into effect of the aforesaid Act that flowage rights over said lands be acquired by condemnation as provided by law; that said land is bounded and described as follows:

34

—10 z (35)—

Also, Tract No. 243, being designated as Parcel D of Exhibit 1, hereto attached, to-wit:

(see next page for description of land)

35

Description.

243 Floodway.

A tract of land lying wholly within Sections 22 and 27, T. 25 N., R. 16 E., of the 5th Principal Meridian, Mississippi County, Missouri, as shown on the plat, and being more particularly described as follows:

The east half of the said section 22, and the east half of the said section 27, containing 640 acres, more or less;

The part of the west half of the said section 22, and the part of the west half of the said section 27, lying southeast of the Birds Point-New Madrid Floodway levee right of way, and being more particularly described as follows: Beginning at a point "A", the said point "A" being the southeast corner of the southwest quarter of the said section 27; thence along the south line of the said southwest quarter of the said section 27, South $89^{\circ} 29'$ West, 2142.5 feet to point "B", the said point "B" being on the southeast boundary line of the said Floodway levee right of way; thence along the said boundary line, North $0^{\circ} 30'$ East, 714.7 feet to point "C"; thence along the said boundary line, North $89^{\circ} 30'$ West, 65.0 feet to point "D"; thence along the said boundary line, North $0^{\circ} 30'$ East, 1806.5 feet to point "E"; thence along the said boundary line, North $89^{\circ} 37\frac{1}{2}'$ West, 20.0 feet to point "F"; thence along the said boundary line, North $0^{\circ} 15'$ East, 2262.7 feet to point "G"; thence along the said boundary line, North $20^{\circ} 02'$ East, 446.7 feet to point "H", the said point "H" being on the south line of the said west half of the said section 22, and being North $89^{\circ} 27'$ East, 562.0 feet from the southwest corner of the said section 22; thence along the said boundary line, North $20^{\circ} 02'$ East, 686.0 feet to point "I"; thence along the said boundary line, South $69^{\circ} 58'$ East, 145.0 feet to point "J"; thence along the said boundary line, North $20^{\circ} 02'$ East, 1162.7 feet to point "K"; thence along the said boundary line, North $11^{\circ} 59'$ East, 3636.5 feet to point "L", the said point "L" being on the north line of the said west half of the said section 22; thence along the said north line of the west half of the said section 22, South $89^{\circ} 43\frac{1}{2}'$ East, 490.4 feet to point "M", the said point "M" being the northeast corner of the said west half of the said section 22; thence along the east line of the said west half of the said section 22, South $0^{\circ} 09'$ East, 5250.0 feet to point "N", the said point "N" being the northeast corner of the said west half of the said section 27; thence along the east line of the said west half of the said section 27, South $0^{\circ} 09'$ East, 5176.9 feet, more or less, to the point of beginning; the said part of the said west half of the said section 22, and the said part of the said west half of the said section 27, containing 393.56 acres, more or less.

There is excepted a ditch easement for right of way of Lat. #2 of D. D. #23 over 19.85 acres, more or less, and also a County road easement for right of way over 11.02 acres,

more or less; the said tract containing 1033.56 acres, more or less.

The bearings of boundaries in this description are referred to true North.

36

—10 z (36)—

That the said land is more definitely described and located by blue prints attached hereto, and made a part of this petition, and filed herewith;

—10 z (38)—

That the defendant William H. Danforth claims some title or estate in and to said Tracts Nos. 187, 281 and 243, as record owner of said real estate;

—10 z (39)—

That the defendant Wilbur E. Hoag is named as trustee for the defendant, the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00; that the said deed of trust is
37 unreleased of record and stands as a lien upon that portion of said Tract No. 243, to-wit, the southeast quarter, and the fractional east half of the southwest quarter, and the fractional southwest quarter of the southwest quarter of Section 22, T. 25 N., R. 16 E., 5th P. M. Mississippi County, Missouri;

—10 z (40)—

That the defendant Wilbur E. Hoag is named as trustee for the defendant Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00; that the said deed of trust is unreleased of record and stands as a lien upon that portion of said Tract No. 243, to-wit, the northeast quarter, and the fractional east half of the northwest quarter, of Section 22, T. 25 N., R. 16 E., 5th P. M., Mississippi County, Missouri;

—10 z (41)—

That the defendant Wilbur E. Hoag is named as trustee for the defendant Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June

14, 1920 and filed June 24, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00; that the said deed of trust is unreleased of record and stands as a lien upon that portion of said Tract No. 243, to-wit, the fractional north half of Section 27, T. 25 N., R. 16 E., 5th P. M., Mississippi County, Missouri;

—10 z (42)—

38 That the defendant Wilbur E. Hoag is named as Trustee for the defendant North Eastern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00; that the said deed of trust is unreleased of record and stands as a lien upon that portion of said Tract No. 243, to-wit, the fractional south half of Section 27, T. 25 N., R. 16 E., 5th P. M., Mississippi County, Missouri;

60

12.

That the plaintiff herein and the defendants and each of them, as owners, claimants and lessees of the property hereinbefore described, have been unable to agree upon the compensation to which said owners, claimants and lessees would be entitled for the use to which the said premises hereinbefore described would be subjected or to amicably settle upon such compensation, and that it is necessary to proceed by condemnation as by law provided to acquire the interest sought to be acquired by these proceedings.

13.

Wherefore Plaintiff prays that this Court direct the Clerk thereof to issue process, summons and notice for the defendants hereinbefore named and for the Order of the Court directing notice of suit and publication thereof to the unknown persons, defendants herein, all as by law required, giving them notice of the time when and the place where this petition will be heard, and for such further order and decree as may be proper and necessary; and that the Court at such time and place will decree to this plaintiff the right of judgment in condemnation herein, decreeing to the plaintiff the full, complete and perpetual right, power and privilege to overflow, as contemplated by the project and described in House Document 90, the above described land as hereinbefore in this petition set out, in connection with the maintenance

and operation of the aforesaid floodway; and that the said defendants and each of them, and all other claimants, be required to show cause on the day herein fixed, why the said plaintiff should not have the relief herein prayed for; and that at said time and place the said Court will appoint three disinterested Commissioners, qualified by law, to determine, assess and award damages sustained by said defendants by virtue of the easement, servitude and overburden to which the said premises herein described shall be subjected
 61 and as hereinbefore described; and that said Commissioners will assess, according to the provisions of the Acts and the provisions of law applicable thereto under which this action is brought, the benefits, if any, which might be sustained by said defendants; and that the said plaintiff shall have free access to said property for the purpose hereinbefore stated and decreed, a perpetual easement over and across said premises, and that this Court will make such necessary orders as in the premises shall be just, proper, necessary and requisite, and for such other and further relief therein to which this petitioner may be found entitled.

LOUIS H. BREUER,
 BRYAN PURTEET,

Attorneys for Plaintiff.

62 State of Missouri,
 City of St. Louis—~~sh~~:

Bryan Purteet, being duly sworn upon his oath, deposes and says that he is Assistant to the United States District Attorney for the Eastern District of Missouri, Southeastern Division, and as such, with said District Attorney, is attorney for the United States of America in the above entitled action;

That he has read the foregoing petition for the condemnation of flowage rights over certain real estate in said petition described, and that all the statements contained therein are true and correct to the best of his understanding, knowledge and belief.

BRYAN PURTEET.

Subscribed and sworn to before me, this the 22nd day of
 September 1933.

(Seal)

JAS. J. O'CONNOR,
 Clerk U. S. District Court.

Indorsed: Filed Sept. 23, 1933, Jas. J. O'Connor, Clerk.
 Attest: A true Copy.

JAS. J. O'CONNOR,
 Clerk.

63 Interlocutory Order and Order Appointing Commissioners.

(Filed Feb. 7, 1934.)

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
Docket No. 716 vs.
Beatrice McDaniel, Popular Bluff, Missouri;

• • • • •

66 William H. Danforth, St. Louis, Missouri;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

69

Defendants.

70 Now on this, the 7th of Feb., 1934 comes the above named plaintiff, the United States of America, by its attorneys, Louis H. Brener, Esquire, United States District Attorney for the Eastern District of Missouri, Southeastern Division, and Claud Crooks, Esquire, Assistant to the said United States Attorney, and presents its petition, duly verified, which action has for its purpose the decreeing by judgment in condemnation to the plaintiff the full, complete and perpetual right, power and privilege to overflow the lands described in said petition, by diversion of excessive flood waters from the main channel of the Mississippi River, when and as in said petition described, and in accordance with the provisions of the act of Congress of May 15, 1928.

And it appearing to me, and I so find, that the persons named as defendants herein have, each and all, been properly and legally served with summons and notice, in the way and manner and within the time provided by law, directing them and each of them to appear and answer before the undersigned Judge of the United States District Court at the court room in the United States District Court House in the City of Cape Girardeau, in the State of Missouri, at the time heretofore fixed by this court, and to-wit, on the 7th of Feb., 1934 and said cause now comes on for hearing at the said place where and at the time when, by said summons and notice and order of publication said proceedings were made returnable.

The plaintiff-condemnor appearing by its attorneys as aforesaid, and the defendants, and each of them, although legally summoned come not, and are each and all in default, except:

and being fully advised in the premises, I do find the issues and each and all of them in favor of the plaintiff-condemnor;

I further find that this court and the judge thereof has jurisdiction over the subject matter of the petition and each and all of the defendants named in said petition as defendants;

That the order of publication heretofore entered in this cause recites in substance the allegations of the petition; that said order of publication notifies all the defendants of the institution and pendency of this suit and of the time and place of the hearing and trial thereof, and of the property involved, and that such order has been published once a week for three consecutive weeks in the East Prairie Eagle, a weekly newspaper published and printed in Mississippi County, Missouri; the last insertion in said publication having been more than ten days before the day set for the hearing of this cause; that proof of publication has been duly made and filed as part of the record herein and is in due form;

That said defendants, one or all, claim the title to said premises, or some interest therein, or lien thereon;

That the land described in said petition and in the notice and order of publication is located in:

Mississippi County,

State of Missouri, and within the Southeastern Division of the Eastern Judicial District of Missouri;

71 That the use for which the said plaintiff-condemnor desires and seeks to acquire said easement from said defendants is a public use, and that the plaintiff-condemnor is entitled to condemn said tract of land to acquire said easement, for the purpose defined and described in said petition, as authorized, defined and prescribed by the act of Congress of May 15, 1928;

That as a part of the project as provided for by the act of Congress of May 15, 1928, Chapter 569, it is necessary to acquire a perpetual easement and privilege to overflow certain lands known as the floodway area, by diverting thereon, excessive flood waters from the main channel of the Mississippi River; that the said area and project are more definitely defined and described by maps, plats and charts heretofore filed with the Clerk of this Court, and within the jurisdiction thereof, and to which said maps, plats and charts reference is hereby made;

That this action is instituted by the Attorney General of the United States, at the request of the Secretary of War, as by statute provided, and under authority of the Act of Congress of May 15, 1928, Chapter 569, and other acts;

That the following lands hereinafter described, and as described, are included within the aforesaid floodway area; and that it is the opinion of the Secretary of War and the Chief of Engineers that it is necessary and advantageous to the interests of this sovereign plaintiff and the carrying into [affect] of the aforesaid Act that flowage rights over said lands be acquired by condemnation as provided by law; that said land is bounded and described as follows:

77 " That the said plaintiff-condemnor is lawfully entitled to acquire said easement over said property, and that the said defendants are entitled to have an assessment of compensation and for damages, if any, which shall be paid by said plaintiff-condemnor to said defendants; also to have the benefits fixed, determined and assessed, if any, because of the use of said lands for the purposes in said petition described;

That the plaintiff-condemnor has endeavored to agree with the defendants concerning the compensation that shall be paid said defendants, as their interests may appear, for the above described easement, and that said plaintiff-condemnor and said defendants have not been able to and cannot agree in regard to said compensation to be paid by the plaintiff-condemnor for the purpose and on account of the matters aforesaid;

Wherefore, it is ordered that Messrs. E. P. Deal, E. C. Davis, and R. L. Shelby, three disinterested freeholders, residents of Mississippi County, Missouri, and being otherwise qualified by law to act, be and the same are hereby appointed commissioners to view the said premises for the purpose of ascertaining and assessing the compensation to which the said defendants shall be entitled for the easement herein condemned, and the resulting damages to the said property, if any, which may be sustained by the respective owners or persons claiming an interest therein; also to ascertain any special benefits to said property on account of the establishment of said floodway, in the amount that such property shall be benefited by its establishment, if any, and to assess the balance of said value and damages over and above the amount of such special benefits assessed against the plaintiff, and make their report under oath to the undersigned without unnecessary delay; and

It is further ordered that the Clerk of the United States District Court for the Eastern District of Missouri, South-

eastern Division, shall prepare copies of this order and cause the same to be served upon the commissioners; and

It is further ordered that said commissioners shall receive as their compensation and be paid for the services herein designated for them to perform at the rate of \$20.00 per day, per each, for such time as they shall be actively employed in the performance of the said services together with compiling and making of their report.

C. B. FARIS,
U. S. District Judge.

Dated this, the 7th day of February, 1934.

Endorsed: Filed Feb. 7, 1934. Jas. J. O'Connor, Clerk.

Commissioners' Report.

Filed May 4, 1934.

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
No. 716 vs.
Beatrice McDaniel, et al., Defendants.

To the Judge and Clerk of the United States District Court,
Eastern District of Missouri, Southeastern Division:

The undersigned Commissioners duly appointed by the Judge of the United States District Court for the Eastern District of Missouri, Southeastern Division, on the 7th day of Feb., 1934, to view the lands hereinafter described and appraise the damages sustained to said premises on account of the acquirement by condemnation of a perpetual easement and privilege to overflow by diversion of excessive flood waters from the Mississippi River, certain lands known as the floodway area, as provided for by the Act of Congress of May 15, 1928, and known as House Document No. 90, also to appraise the benefits accruing to said premises because of the aforesaid action; and the said commissioners being resident freeholders of Mississippi County, State of Missouri, and disinterested in the matters and things above stated, and having first subscribed to the usual and required oath, and being qualified by law to serve as such Commissioners, do respectfully report:

That in obedience to the order of the said Court we did proceed to view the lands hereinafter described and appraise the damages and benefits sustained to said premises because

of the aforesaid action, and that the description of the premises is as follows:

79 Clerk's Note: Heretofore described at marginal page 35 of this printed record.

That we hereby assess damages for Tract No. 243 in the sum of \$20409.90; That we hereby assess benefits for Tract No. 243 in the sum of \$.....

80 That because of the conflicting interests of such parties, your Commissioners do not make any report as to the ownership respectively of defendants, in said premises or the proportionate rights or claims therein of any of said defendants.

The undersigned Commissioners, E. P. Deal, E. D. Davis and R. L. Shelby as aforesaid, being duly sworn, upon their oath, state that the matters and things hereinbefore stated are true to the best of their knowledge and belief and that they have to the best of their abilities viewed the lands and assessed the damages and benefits to said premises, as hereinbefore set forth.

(Seal)

E. P. DEAL
E. C. DAVIS
R. L. SHELBY

Commissioners.

Subscribed and sworn to before me this 4th day of May 1934.

JAS. J. O'CONNOR

Clerk of the U. S. District Court.

Filed May 4, 1934 Jas. J. O'Connor, Clerk

81 (Exceptions of Plaintiff to Report of Viewers.)

(Filed May 9, 1934.)

Comes now the plaintiff and excepts to the findings of the viewers heretofore appointed by the Court to view the property described in the petition filed in this cause, and files its said exceptions with the Clerk of this Court. The plaintiff excepts to the following items contained in the said viewers' report, to wit:—the damages assessed for Tracts Nos. 243, 250, 259, 281, 282, 306 and 347 for the following reasons among others, to-wit:

That the amount found as assessed damages alleged to have been suffered by the defendants because of the con-

demnation of an easement for flowage rights over said property described in said condemnation suit as Tracts Nos. 243, 250, 259, 281, 282, 306 and 347 is excessive, exorbitant, and inconsistent with the facts;

That the said findings are inconsistent with the findings in other cases under the same state of facts and conditions in proceedings of like nature concerned in the levee and floodway project described in the petition;

That the findings are against the weight of evidence;

That the said viewers failed to find and failed to consider any element of benefit because of the construction of such project, when in fact said defendants do derive benefit thereby; that said elements of benefit were ignored by said viewers;

That the said viewers placed an excessive and exorbitant value upon the real estate condemned;

That the said viewers failed to be governed by the law in such cases made and provided in that they failed to value said premises according to the market value thereof at the time of filing the said petition, or at the time of making said report;

82. That the value of the improvements placed upon said premises is in excess of their actual value and that the damages allowed therefor are in excess of what will be sustained to said improvements;

That the findings are indefinite and uncertain and that the plaintiff is not definitely and adequately informed as to the nature of the damages to said premises and improvements thereon, and the manner in which such damages apply and how applied;

That the said viewers have considered elements of damage such as speculative or resale values, contrary to law;

That the said viewers have proceeded upon the theory that the condemnor is liable for damages resulting from overflow of the lands under condemnation, from crevasses in said riverside levee at points other than at the point designated as the fuse plug section, which is contrary to the letter and spirit of the Floodway Act, and for damages resulting from the overflow from said Mississippi River upon the said lands occasioned by other than the acts of this con-

demnor in diverting excessive flood waters from said river, to all of which the condemnor excepts;

That in arriving at the designated amount fixed by the report as damages, the said viewers have wholly failed to consider the periods or frequency of such overflow that would be due directly to the operation of the project as defined in the petition;

That they have failed or refused to follow or be guided by the instructions of the Court;

That the said viewers were and are actuated and [governed] in their findings by bias and prejudice against this sovereign plaintiff and the said project, and are partial to and in behalf of the person or persons owning the premises described in their said report;

That because of the foregoing assignments together with others not herein stated, the plaintiff herein asks the Court to vacate, set aside and hold for naught, the said findings, as unwarranted in law and not authorized by the facts existing in the premises; and plaintiff asks that it be heard in support of these objections, and upon the hearing of same, that this Court will make such order herein as right and justice require.

HARRY C. BLANTON

Attorneys for Plaintiff.

Dated this, the 7th
day of May, 1934.

In forced: "Filed May 9-1934 Jas. J. O'Connor, Clerk."

83 (Exceptions of Defendant, William H. Danforth,
to Report of Viewers.)

(Filed June 4, 1934.)

Now comes William H. Danforth, a resident of St. Louis, Missouri, and objects and excepts to the report of E. P. Deal, E. C. Davis and R. L. Shelby, Commissioners in the above entitled condemnation suit, which commissioners were duly appointed by the United States District Court, South-eastern Division of the Eastern Judicial District of Missouri, for the reason that the damages awarded this defendant by said commissioners in the sum of Twenty Thousand Four Hundred Nine Dollars and Ninety Cents (\$20,409.90) are wholly inadequate and are not fair and just compen-

sation for the properties taken or properties affected and damaged by the flowage rights demanded and required by plaintiff over this defendant's land.

This defendant further states that he is the owner of a contiguous body of land consisting of approximately one thousand thirty-three and fifty-six [hundreds] (1,033.56) acres, described as follows, to-wit:

84

Clerk's Note: Heretofore described at marginal page 35 of this printed record.

85

The said defendant, William H. Danforth, further objects and excepts to the said award:

1. Because the said Commissioners, and each of them, used improper principles on which they based their findings and made their award, were without jurisdiction or power to render an award; and the plaintiff and defendant, William H. Danforth, reached an accord as to the damages and made a written contract prior to appointment of the said commissioners and prior to the filing of the said award, under the terms of which contract the said plaintiff and said defendant, William H. Danforth, agreed upon settlement for the damages to Tract No. 243 on the sum of \$31,681.98, which should be paid into Court by plaintiff under the law and under said contract of settlement.

2. Because the said Commissioners were biased and prejudiced in favor of the Government.

3. Because the said flowage would cause damage to the whole tract and would destroy a large part of the same.

4. Because the said Commissioners gave no opportunity to this defendant to be heard and failed to notify this defendant of any hearing before the said Commissioners.

5. That the award of the said Commissioners is improper in form as well as in substance.

6. That the said Commissioners failed to take into consideration, in arriving at their said award, proper legal and just elements of damage.

7. That the award of the commissioners is based upon speculation.

Wherefore, This Defendant prays that the award of the commissioners be set aside, and that new commissioners be

appointed in accordance with the law, and for such other and further relief as to the Court may seem meet and proper.

LEAHY, SAUNDERS &
WALTHER & J. L. LONDON
Attorneys for Defendant,
William H. Danforth.

86 (Order granting leave to William H. Danforth,
to file Answer and Cross-Bill.)

(Filed July 5, 1934.)

Upon oral request of defendant, William H. Danforth, through counsel, the said defendant is granted leave to file answer and cross-bill or other pleading.

C. B. FARIS,
Judge.

Endorsed: Filed July 5, 1934, Jas. J. O'Connor, Clerk.

87 Application for Dedimus to Take Depositions.

Filed Aug. 25, 1934

Comes now William H. Danforth, one of the defendants in the above entitled cause and respectfully represents to the Court that heretofore on the 15th day of August, 1934, said defendant, through his attorneys, caused to be served upon plaintiff's attorneys of record herein a notice in writing that depositions of witnesses to be read in evidence in the above entitled cause would be taken by said defendant at the office of Covington, Burling & Rublee, Attorneys, Union Trust Building, Washington, D. C. on the 30th day of August, 1934;

Said defendant further states that the testimony of the witnesses whose depositions said defendant intends to take under said notice is indispensable in the defense of this cause.

Wherefore, the premises considered, said defendant prays that the Court order a dedimus to issue, directed to any Notary Public, or to any Judge, Justice of the Peace, or other judicial officer of the District of Columbia, authorizing said Notary Public, Judge, Justice of the Peace, or other judicial officer of the District of Columbia to cause to come before him such person or persons as shall be named

to him by said defendant herein for the purpose of giving their testimony under the notice hereinbefore mentioned.

LEAHY, SAUNDERS &
WALTHER & J. L. LONDON

Attorneys for Defendant,
William H. Danforth.

88 State of Missouri.
City of St. Louis—ss.

J. L. London, of lawful age, being duly sworn, on his oath states that he is agent and attorney for William H. Danforth, defendant herein, and as such is duly authorized to make this affidavit, and upon his oath states that the matters and things stated in the foregoing petition are true according to his best knowledge, information and belief.

J. L. LONDON

Subscribed and sworn to before me this 20th day of August, 1934.

My commission expires:

LILIE A. WOLF

(Seal)

Notary Public within and for
the City of St. Louis, Missouri.

Application ordered as prayed:

C. B. FARIS, Judge.

Endorsed: Filed Aug. 25, 1934. Jas. J. O'Connor, Clerk.

89 (Answer and Counterclaim of William H. Danforth.)

(Filed September 10, 1934.)

In the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,
Case No. 716. vs.
Beatrice McDaniel, et al., Defendants.

Tracts Nos. 243 and 281.

Now comes William H. Danforth and for his answer, filed by leave of Court to the petition heretofore filed by the plaintiff, states that he is the owner of Tracts Nos. 243 and 281 as set out in the plaintiff's petition in said cause No. 716, now

pending in this Court, which Tracts are correctly described in plaintiff's petition.

For further ansywer, said defendant states that the petition filed in this case by the plaintiff was filed on or about the 22nd day of September, 1933 in this Court for the purpose, as therein alleged, of condemning easements for flowage rights over the said two tracts of land. The plaintiff further states that prior to the filing of said suit by the said plaintiff, the United States of America, the plaintiff and the defendant entered into a written contract covering the said two tracts of land, whereby the plaintiff made a written offer of settlement for the damages and for the purchase of an easement over the said tracts for floodway purposes, which said offers were duly accepted in writing by this defendant. That the said parties expressly fixed and agreed upon the extent of damages in the sum of \$31,681.98. for the perpetual flowage easement over tract No. 243 and in the amount of 90 \$2208.94 on tract No. 281. That the said offers on the said two tracts of land were made by the plaintiff on or about the 14th day of January, 1932 in a letter dated January 14, 1932, the plaintiff granting the said defendant the time for acceptance until March 15, 1932. That thereafter, on or about the 2nd day of March, 1932, the said defendant duly accepted, in writing, the said offers of the plaintiff on the said two tracts of land.

Further answering, the said defendant William H. Danforth specifically denies the averment in the plaintiff's petition that the said defendant and the plaintiff were unable to agree upon the compensation or damages to which the owner would be entitled for the use to which the premises described in the said petition will or may be subjected, and specifically denies that they were unable to amicably settle or agree upon the extent of the damages or the value of the easement for flowage purposes, as set out in plaintiff's petition.

The said defendant further stated that in the offers made by the plaintiff, covering the said two tracts of land, it was expressly set out that the only purpose of filing a condemnation suit would be to clear the title through a friendly judgment to be based upon an agreed verdict. Instead, the plaintiff's petition prays for the issuance of process, summons and notice for the defendant for an order directing notice of suit and publication thereof to unknown persons named as defendants, and that the Court decree to plaintiff the right of judgment and condemnation, decreeing to plaintiff the full, complete and perpetual right, power and privilege to over-

flow, as contemplated by the project and described in House Document 90, the above mentioned land, all in connection with the maintenance and operation of the floodway. That free access is demanded to the property for the purpose set out in the petition and decree; that a perpetual easement over and across said premises is prayed for.

Said defendant William H. Danforth further states that he has duly offered plaintiff title to said easements and has requested payment in the sum of \$31,681.98 for the said flowage easement over Tract No. 243 and the sum of \$2208.94 for the said flowage easement over Tract No. 281 and herewith tenders title to said flowage easements, covering the said tracts, upon condition that the said plaintiff pay in the Court the said sum of \$31,681.98 and \$2208.94, respectively, for the benefit of the defendants, as their interests may appear. That the said plaintiff has failed and refused and now fails and refuses to carry out said contract as above set forth.

Said defendant William H. Danforth further states that the actual damages to the two tracts, by reason of the flowage easements as set out above, are in excess of the said sums of \$31,681.98 and \$2208.94, for Tracts Nos. 243 and 281 respectively; that the offers made by the plaintiff, United States of America, and accepted by the defendant, as aforesaid, were made and accepted as compromises and settlements and as the amounts agreed upon by the parties, fixing the damages to the said two tracts of land by reason of the said flowage easements.

Wherefore, by reason of all the above, said defendant prays for judgments against the plaintiff in the sums of \$31,681.98, covering Tract No. 243 and for \$2208.94, covering Tract No. 281, together with interest at the rate of 6% per annum, to be paid in the Court for the benefit of the defendants in the case in accordance with their respective rights and interest, and further prays that the Court decree judgment in favor of the plaintiff and against the defendants for the said perpetual flowage easements covering the said two tracts, upon payment into Court of the said sums.

Now comes William H. Danforth and for his counterclaim, filed by leave of Court to the petition heretofore filed by the plaintiff, states that he is the owner of Tracts Nos. 243 and 281 as set out in the plaintiff's petition in said cause No. 716, now pending in this Court, which Tracts are correctly described in plaintiff's petition.

For further counterclaim, said defendant states that the petition filed in this case by the plaintiff was filed on or about the 22nd day of September, 1933 in this Court for the purpose, as therein alleged, of condemning easements for flowage rights over the said two tracts of land. The plaintiff further states that prior to the filing of said suit by the said plaintiff, the United States of America, the plaintiff and the defendant entered into a written contract covering the said two tracts of land, whereby the plaintiff made a written offer of settlement for the damages and for the purchase of an easement over the said tracts for floodway purposes, which said offers were duly accepted in writing by this defendant. That the said parties expressly fixed and agreed upon the extent of damages in the sum of \$31,681.98 for the perpetual flowage easement over Tract No. 243 and in the amount of \$2208.94 on Tract No. 281. That the said offers on the said two tracts of land were made by the plaintiff on or about the 14th day of January, 1932 in a letter dated January 14, 1932, the plaintiff granting the said defendant the time for acceptance until March 15, 1932. That thereafter, on or about the 2nd day of March, 1932, the said defendant duly accepted, in writing, the said offers of the plaintiff on the said two tracts of land.

93 For further counterclaim, the said defendant, William H. Danforth, specifically denies the averment in the plaintiff's petition that the said defendant and the plaintiff were unable to agree upon the compensation or damages to which the owner would be entitled for the use to which the premises described in the said petition will or may be subjected, and specifically denies that they were unable to amicably settle or agree upon the extent of the damages or the value of the easement for flowage purposes, as set out in plaintiff's petition.

The said defendant further states that in the offers made by the plaintiff, covering the said two tracts of land, it was expressly set out that the only purpose of filing a condemnation suit would be to clear the title through a friendly judgment to be based upon an agreed verdict. Instead, the plaintiff's petition prays for the issuance of process, summons and notice for the defendant for an order directing notice of suit and publication thereof to unknown persons named as defendants, and that the Court decree to plaintiff the right of judgment and condemnation, decreeing the plaintiff the full, complete and perpetual right, power and privilege to overflow, as contemplated by the project and described in House Document 90, the above mentioned land, all in connection with the

maintenance and operation of the floodway. That free access is demanded to the property for the purpose set out in the petition and decree; that a perpetual easement over and across said premises is prayed for.

Said defendant William H. Danforth further states that he has duly offered plaintiff title to said easements and has requested payment in the sum of \$31,681.98 for the said flowage easement over Tract No. 243 and the sum of 94 - \$2208.94 for the said flowage easement over Tract No. 281 and herewith tenders title to said flowage easements, covering the said tracts, upon condition that the plaintiff pay in the Court the said sum of \$31,681.98 and \$2208.94, respectively, for the benefit of the defendants, as their interests may appear. That the said plaintiff has failed and refused and now fails and refuses to carry out said contract as above set forth.

Said defendant William H. Danforth further states that the actual damages to the two tracts, by reason of the flowage easements as set out above, are in excess of the said sums of \$31,681.98 and \$2208.94, for Tracts Nos. 243 and 281 respectively; that the offers made by the plaintiff, United States of America, and accepted by the defendant, as aforesaid, were made and accepted as compromises and settlements and as the amounts agreed upon by the parties, fixing the damages to the said two tracts of land by reason of the said flowage easements.

Wherefore, by reason of all the above, said defendant prays for judgments against the plaintiff in the sums of \$31,681.98, covering Tract No. 243 and for \$2208.94, covering Tract No. 281, together with interest at the rate of 6% per annum, to be paid in the Court for the benefit of the defendants in the case in accordance with their respective rights, and interest; and further prays that the Court decree judgment in favor of the plaintiff and against the defendants for the said perpetual flowage easements covering the said two tracts, upon payment into Court of the said sums.

LEAHY, SAUNDERS &
WALTHER, &

J. L. LONDON,

Attorneys for Defendant.

Endorsed: Filed Sept. 10, 1934. Jas. J. O'Connor, Clerk.

95 (Stipulation Extending Time for Taking Depositions, etc.)

(Filed September 21, 1934.)

It is hereby stipulated and agreed this 30th day of August, 1934, by and between the parties hereto by their respective attorneys, as follows:

1. The taking of the depositions of witnesses to be read in evidence in the above entitled cause on the part of defendant William H. Danforth is hereby continued from the 30th day of August, 1934, as stated in the Notice to Take Depositions heretofore served upon the plaintiff's attorney by the attorney for defendant William H. Danforth, to the 7th day of September, 1934, at ten o'clock A. M., at the law offices of Covington, Burling, Rublee, Acheson & Shorb, Room 701, Union Trust Building, Washington, D. C.

2. The photostatic copies or duplicates thereof of any or all documents used in the case of United States vs. Frances-Ralph Realty Company, No. 584, in the District Court of the United States for the Eastern District of Missouri, South-eastern Division, may be used in this case in lieu of the originals of said documents, and the production of the originals of said documents in this case is hereby dispensed with.

96 And it is further agreed that the signatures on said photostatic copies or duplicates thereof are authentic reproductions of the original signatures of the persons by whom said documents purport to have been signed, and the plaintiff hereby waives further proof of the authenticity of said signatures.

The foregoing is subject to the rights of plaintiffs to object to depositions, exhibits or documentary evidence:

(1) Upon the ground of competency, relevancy or materiality.

(2) That the right is reserved by the plaintiff to first make investigation and examination of the original signatures and to ascertain their authenticity before agreement is made to use copies instead of originals.

The purpose of this stipulation is in no manner to admit by plaintiff the admissibility of any depositions or documents offered, or the right to offer the same in this case, or in any manner to consider that such depositions or documents have any probative force or tend to prove any issues in this case.

and that the sole and only purpose of this stipulation is to dispense with foundation proof.

Signed this 6th day of September, 1934.

For the Attorney General,

HARRY W. BLAIR,
Assistant Attorney General.

J. L. LONDON,
Attorney for Defendant William
H. Danforth.

Filed: Sept. 21, 1934. Jas. J. O'Connor, Clerk. (Attached to deposition.)

97 (Motion of Plaintiff to strike Answer and Counterclaim of William H. Danforth, etc.)

(Filed October 8, 1934.)

Comes now the plaintiff, the United States of America, through and by its attorneys of record, Harry C. Blanton, United States District Attorney for the Eastern District of Missouri, Southeastern Division, and L. John Weber, Special Assistant to the aforesaid District Attorney, and John C. Dyott, Esquire, Special Counsel with the United States War Department, Corps of Engineers, and moves the Court as follows:

First: To strike the entire alleged answer and counterclaim of defendant, William H. Danforth, as to Tracts Nos. 243 and 281 heretofore filed in Case No. 716 on the 10th day of September, 1934, for the reason that the said alleged answer and counterclaim were filed out of time and after an interlocutory judgment of condemnation had been entered in this cause on, to-wit, February 7, 1934, and after the October term, 1933, of this court;

98 Second:

(A) To strike the entire alleged answer of defendant, William H. Danforth, as to tracts Nos. 243 and 281 in Case No. 716 beginning on page one and through line three on page four of the alleged answer and counterclaim heretofore filed in said Case No. 716 on September 10, 1934, the portion hereby moved to be stricken reading as follows:

"Now comes William H. Danforth and for his answer, filed by leave of Court to the petition heretofore filed by the plaintiff, states that he is the owner of Tracts Nos. 243 and 281 as

set out in the plaintiff's petition in said cause No. 716, now pending in this Court, which Tracts are correctly described in plaintiff's petition.

For further answer, said defendant states that the petition filed in this case by the plaintiff was filed on or about the 22nd day of September, 1933, in this Court for the purpose, as therein alleged, of condemning easements for flowage rights over the said two tracts of land. The plaintiff further states that prior to the filing of said suit by the said plaintiff, the United States of America, the plaintiff and the defendant entered into a written contract covering the said two tracts of land, whereby the plaintiff made a written offer of settlement for the damages and for the purchase of an easement over the said tracts for floodway purposes, which said offers were duly accepted in writing by this defendant. That the said parties expressly fixed and agreed upon the extent of damages in the sum of \$31,681.98 for the perpetual flowage easement over tract No. 243 and in the amount of \$2208.94 on tract No. 281.

That the said offers on the said two tracts of land were made by the plaintiff on or about the 14th day of January, 1932, in a letter dated January 14, 1932, the plaintiff granting the said defendant the time for acceptance until March 15, 1932. That thereafter, on or about the 2nd day of March, 1932, the said defendant duly accepted, in writing, the said offers of the plaintiff on the said two tracts of land.

Further answering, the said defendant William H. Danforth specifically denies the averment in the plaintiff's petition that the said defendant and the plaintiff were unable to agree upon the compensation or damages to which the owner would be entitled for the use to which the premises described in the said petition will or may be subjected, and specifically denies that they were unable to amicably settle or agree upon the extent of the damages or the value of the easement for flowage purposes, as set out in plaintiff's petition.

99 The said defendant further states that in the offers made by the plaintiff, covering the said two tracts of land, it was expressly set out that the only purpose of filing a condemnation suit would be to clear the title through a friendly judgment to be based upon an agreed verdict. Instead, the plaintiff's petition prays for the issuance of process, summons and notice for the defendant for an order directing notice of suit and publication thereof to unknown persons named as defendants, and that the Court decree to plaintiff the right of judgment and condemnation, decreeing to plaintiff the full, complete and perpetual right, power and

privilege to overflow, as contemplated by the project and described in House Document 90, the above mentioned land, all in connection with the maintenance and operation of the floodway. That free access is demanded to the property for the purpose set out in the petition and decree; that a perpetual easement over and across said premises is prayed for.

Said defendant William H. Danforth further states that he has duly offered plaintiff title to said easements and has requested payment in the sum of \$31,681.98 for the said flowage easement over Tract No. 243 and the sum of \$2208.94 for the said flowage easement over Tract No. 281 and herewith tenders title to said flowage easements, covering the said tracts, upon condition that the said plaintiff pay in the Court the said sum of \$31,681.98 and \$2208.94, respectively, for the benefit of the defendants, as their interests may appear. That the said plaintiff has failed and refused and now fails and refuses to carry out said contract as above set forth.

Said defendant William H. Danforth further states that the actual damages to the two tracts, by reason of the flowage easements as set out above, are in excess of the said sums of \$31,681.98 and \$2208.94, for Tracts Nos. 243 and 281 respectively; that the offers made by the plaintiff, United States of America, and accepted by the defendant, as aforesaid, were made and accepted as compromises and settlements and as the amounts agreed upon by the parties, fixing the damages to the said two tracts of land by reason of the said flowage easements.

Wherefore, by reason of all the above, said defendant prays for judgments against the plaintiff in the sum of \$31,681.98, covering Tract No. 243 and for \$2208.94, covering Tract No. 281, together with interest at the rate of 6% per annum, to be paid in the Court for the benefit of the defendants in the case in accordance with their respective rights and interest, and further prays that the Court decree judgment in favor of the plaintiff and against the defendants for the said perpetual flowage easements covering the said two tracts upon payment into Court of the said sums.

100 for the reason that, if the facts in said portion hereby moved to be stricken are as alleged by defendant, William H. Danforth, the same have been waived by said defendant because of his failure to plead the same prior to the entry and findings of the Court as set out in the interlocutory judgment made and entered in this cause on February 7, 1934, and, for the further reason in any event, if the facts in said portion hereby moved to be stricken are as alleged

by defendant, the same have been waived by the defendant's failure to plead the same before the expiration of the October Term, 1933, of this court;

(B) To strike out the entire alleged counterclaim of defendant, William H. Danforth, as to tracts Nos. 243 and 281 in Case No. 716 beginning on page four in line four thereof and through page six of the alleged answer and counterclaim heretofore filed in said Case No. 716 on September 10, 1934, the portion hereby moved to be stricken reading as follows:

"Now comes William H. Danforth and for his counterclaim, filed by leave of Court to the petition heretofore filed by the plaintiff, states that he is the owner of Tracts Nos. 243 and 281 as set out in the plaintiff's petition in said cause No. 716, now pending in this Court, which Tracts are correctly described in plaintiff's petition.

For further counterclaim, said defendant states that the petition filed in this case by the plaintiff was filed on or about the 22nd day of September, 1933, in this Court for the purpose, as therein alleged, of condemning easements for flowage rights over the said two tracts of land. The plaintiff further states that prior to the filing of said suit by the said plaintiff, the United States of America, the plaintiff and the defendant entered into a written contract covering the said two tracts of land, whereby the plaintiff made a written offer of settlement for damages and for the purchase of an easement over the said tracts for floodway purposes, which said offers were duly accepted in writing by this defendant. That the said parties expressly fixed and agreed upon the extent of damages in the sum of \$31,681.98 for the perpetual flowage easement over Tract No. 243 and in the amount of \$2208.94 on Tract No.

281. That the said offers on the said two tracts of land were made by the plaintiff on or about the 14th day of January, 1932 in a letter dated January 14, 1932, the plaintiff granting the said defendant the time for acceptance until March 15, 1932. That thereafter, on or about the 2nd day of March, 1932, the said defendant duly accepted, in writing, the said offers of the plaintiff on the said two tracts of land.

For further counterclaim, the said defendant, William H. Danforth, specifically denies the averment in the plaintiff's petition that the said defendant and the plaintiff were unable to agree upon the compensation or damages to which the owner would be entitled for the use to which the premises described in the said petition will or may be subjected, and specifically denies that they were unable to amicably settle

or agree upon the extent of the damages or the value of the easement for flowage purposes, as set out in plaintiff's petition.

The said defendant further states that in the offers made by the plaintiff, covering the said two tracts of land, it was expressly set out that the only purpose of filing a condemnation suit would be to clear the title through a friendly judgment to be based upon an agreed verdict. Instead, the plaintiff's petition prays for the issuance of process, summons and notice for the defendant for an order directing notice of suit and publication thereof to unknown persons named as defendants, and that the Court decree to plaintiff the right of judgment and condemnation, decreeing the plaintiff the full, complete and perpetual right, power and privilege to overflow, as contemplated by the project and described in House Document 90, the above mentioned land, all in connection with the maintenance and operation of the floodway. That free access is demanded to the property for the purpose set out in the petition and decree; that a perpetual easement over and across said premises is prayed for.

Said defendant William H. Danforth further states that he has duly offered plaintiff title to said easements and has requested payment in the sum of \$31,681.98 for the said flowage easement over Tract No. 243 and the sum of \$2208.94 for the said flowage easement over Tract No. 281 and herewith tenders title to said flowage easements, covering the said tracts, upon condition that the plaintiff pay in the Court the said sum of \$31,681.98 and \$2208.94, respectively, for the benefit of the defendants, as their interests may appear. That the said plaintiff has failed and refused and now fails and refuses to carry out said contract as above set forth.

102 Said defendant William H. Danforth further states that the actual damages to the two tracts, by reason of the flowage easements as set out above, are in excess of the said sums of \$31,681.98 and \$2208.94, for Tracts Nos. 243 and 281 respectively; that the offers made by the plaintiff, United States of America, and accepted by the defendant, as aforesaid, were made and accepted as compromises and settlements and as the amounts agreed upon by the parties, fixing the damages to the said two tracts of land by reason of the said flowage easements.

Wherefore, by reason of all the above, said defendant prays for judgments against the plaintiff in the sums of \$31,681.98, covering Tract No. 243 and for \$2208.94, cover-

ing Tract No. 281, together with interest at the rate of 6% per annum, to be paid in the Court for the benefit of the defendants in the case in accordance with their respective rights, and interest, and further prays that the Court decree judgment in favor of the plaintiff and against the defendants for the said perpetual flowage easements covering the said two tracts, upon payment into Court of the said sums,"

for the reason that, if the facts in said portion hereby moved to be stricken are as alleged by defendant, William H. Danforth, the same have been waived by said defendant because of his failure to plead the same prior to the entry and findings of the Court as set out in the interlocutory judgment made and entered in this cause on February 7, 1934, and for the further reason in any event, if the facts in said portion hereby moved to be stricken are as alleged by defendant, the same have been waived by defendant's failure to plead the same before the expiration of the October Term, 1933, of this court.

HARRY C. BLANTON, per L. J.
W.

L. JOHN WEBER,
Special Assistant.

JOHN C. DYOTT,
Attorneys for Plaintiff.

Dated this the 8th day of October, 1934.

Endorsed: Filed Oct. 8-1934, Jas. J. O'Connor, Clerk.

103 (Notice of Motion of William H. Danforth for Leave to Amend Exceptions to Report of Viewers.)

(Filed October 12, 1934.)

To The Above Named Plaintiff, or Harry C. Blanton and L. John Weber, Its Attorneys of Record:

Take Notice that defendant William H. Danforth will on Friday morning, October 12, 1934, at 9:00 A. M., or as soon thereafter as counsel for the said defendant William H. Danforth can be heard, present a motion to the Court to amend the exceptions heretofore filed on or about June 4, 1934, a copy of which motion is hereto attached, at which time and place you may be present if you so desire.

LEAHY, SAUNDERS & WALTHER, &
J. L. LONDON,

Attorneys for Defendant, William
H. Danforth.

104 (Motion of William H. Danforth for leave to Amend
Exceptions to Report of Viewers.)

(Filed October 12, 1934.)

Now comes the defendant, William H. Danforth, and moves the Court to permit the said defendant to amend the exceptions heretofore filed in this cause on or about June 4, 1934, in the following respects, to-wit: By adding after the word "award", at the bottom of page 2, in paragraph "1." the following:

"That the said commissioners were without jurisdiction or power to render an award; and for the further reason that the plaintiff and the defendant William H. Danforth reached an accord as to the damages and had made a written contract prior to the appointment of the said Commissioners and prior to the filing of the said award, to-wit: on the 2nd day of March, 1932, under the terms of which contract the said plaintiff and the said defendant William H. Danforth as owner of Tract No. 243 had agreed in writing upon settlement for damages to Tract No. 243 in the sum of \$31,681.98, through a letter written by the plaintiff, through its duly authorized agent, dated January 14, 1932; that the said offer was duly accepted by the defendant William H. Danforth on March 2, 1932, under the terms of which contract only friendly condemnation proceedings were to be instituted, with the request for an agreed verdict, and for the purpose of clearing title; that the said offer and acceptance were in the following language, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932.

Subject: Offer for flowage rights, Bird's Point-New Madrid
Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

105 "1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of

Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 243, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

Incls.—

Tract map;
General map of floodway;
Addressed return envelope.

Accepted:

WM. H. DANFORTH,
(Owner)
c/o Purina Mills
St. Louis, Mo.
(Address)
March 2, 1932.
(Date)

That the said sum of \$31,681.98 should be paid into Court by plaintiff under the law and under the said contract of settlements. That in accordance with the terms of the said written contract the said defendant herewith tenders into Court title to the said easement as prayed in plaintiff's petition, conditioned upon payment by plaintiff into Court of the said sum of \$31,681.98 for the benefit of the defendant as their interest may appear in the said cause."

Said defendant also desires to amend the exceptions by striking out Paragraph 7. reading as follows:

"7. That the award of the commissioners is based upon speculation."

106 Said defendant also desires to amend the prayer by striking the following part of the prayer:

"and that new commissioners be appointed in accordance with the law,"

and substituting therefor, after the word "aside," in the second line of the prayer the following:

"and that either new commissioners be appointed with instructions from the Court to enter up an award in the said sum of \$31,681.98, to be affirmed by the Court, or that the Court enter up judgment in the sum of \$31,681.98 in favor of the defendants and against the plaintiff, and that the Court enter a decree in favor of the plaintiff and against the defendants for the perpetual easement prayed in plaintiff's petition."

LEAHY, SAUNDERS & WALTHER
& J. L. LONDON,

Attorneys for Defendant, William
H. Danforth.

Endorsed: Filed Oct. 12, 1934, Jas. J. O'Connor, Clerk.

106a

Memorandum for Clerk.

(Order of Submission of Motion of William H. Danforth for Leave to Amend Exceptions to Report of Viewers.)

United States District Court, Eastern Division of the Eastern
Judicial District of Missouri.

United States of America,
No. 716, vs.
Beatrice McDaniel, et al.

Tract No. 281

" " 243

Oct. 12, 1934.

Motion of defendant Danforth to amend exceptions filed, together with notice to take up for argument. Plaintiff appears through L. J. Weber, and defendant through J. L. Lon-

don. Motion argued and submitted, and finding as per memorandum filed.

L. JOHN WEBER,
Special Asst. to the U. S. Atty.
Atty. for Plff.

LEAHY, SAUNDERS &
WALTHER &
J. L. LONDON.

107 (Opinion and Order on Motion of William H. Danforth
for Leave to Amend Exceptions to Report of
Viewers.)

(Filed October 12, 1934.)

Motion of defendant Danforth to amend exceptions filed. Parties appear through their counsel. Motion argued and submitted. That part of motion on page one, beginning with line 6 of body of motion reading as follows:

"That the said commissioners were without jurisdiction or power to render an award; and for the further reason that the plaintiff and the defendant William H. Danforth reached an accord as to the damages and had made a written contract prior to the appointment of the said Commissioners and prior to the filing of the said award, to-wit: on the 2nd day of March, 1932, under the terms of which contract the said plaintiff and the said defendant William H. Danforth as owner of Tract No. 243 had agreed in writing upon settlement for damages to Tract No. 243 in the sum of \$31,698.91 through a letter written by the plaintiff, through its duly authorized agent, dated January 14, 1932; that the said offer was duly accepted by the defendant William H. Danforth on March 2, 1932, under the terms of which contract only friendly condemnation proceedings were to be instituted, with the request for an agreed verdict, and for the purpose of clearing title; that the said offer and acceptance were in the following language, to-wit:

Subject:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932.

"Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

"To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

"1. The Secretary of War has authorized payment for

either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

108. "2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Two thousand two hundred eight and 94/100—Dollars (\$2,208.94) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 281, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

"3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should [expedit] final settlement and reduce legal expenses.

"4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is enclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

"Incls.—

Tract map;
General map of floodway;
Addressed return envelope.

Accepted:

WM. H. DANFORTH,
(Owner)
c/o Purina Mills
St. Louis, Mo.
(Address)
March 2, 1932
(Date)

"That the said sum of ~~\$2,208.94~~ should be paid into the Court by plaintiff under the law and under the said contract of settlement. That in accordance with the terms of the said written contract the said defendant herewith tenders into Court title to the said easement as prayed in plaintiff's peti-

tion, conditioned upon payment by plaintiff into Court of the said sum of ~~\$2,208.94~~ for the benefit of the defendants as their interest may appear in the said cause."

That part of motion above set out is overruled on the ground that the matter pleaded in said motion has no place in the exceptions to award. Said defendant Danforth excepts to the ruling of the Court in refusing to permit the said amendment.

That part of the motion beginning on bottom of page two, beginning at line four from bottom thereof, and on page 3, reading as follows:

"Said defendant also desires to amend the exceptions by striking out paragraph 7, reading as follows:"

"7. That the award of the commissioners is based upon speculation."

Said defendant also desires to amend the prayer by striking the following part of the prayer:

109 "and that new commissioners be appointed in accordance with the law"

"and substituting therefor after the word 'aside,' in the second line of the prayer the following:

"and that either new commissioners be appointed with instructions from the Court to enter up an award in the said sum of \$31,698.91, to be affirmed by the Court, or that the Court enter up judgment in the sum of \$31,698.91, in favor of the defendants and against the plaintiff, and that the Court enter a decree in favor [—] plaintiff and against the defendants for the perpetual easement prayed in plaintiff's petition,"

sustained, and said amendments may be made as requested, ~~in permitting the said amendments~~. To each of which said amendments the plaintiff separately excepts.

L. JOHN WEBER,
Special Assistant to the United
States Attorney,
Attorney for the Plaintiff.

LEAHY, SAUNDERS &
WALTHER &
J. L. LONDON.

Dated October 12, 1934.

Endorsed: Filed Oct. 12, 1934. Jas. J. O'Connor, Clerk.

110 (Order Sustaining Motion of Plaintiff to Strike Answer and Counter-claim of William H. Danforth.)

Monday, October 15, 1934.

Now on this day came the parties in the above entitled cause, by their respective attorneys; whereupon the motion of plaintiff to strike out answer and counterclaim of William H. Danforth, one of the defendants herein, as to Tracts Nos. 243 and 281, heretofore filed, is submitted to the court, and by the Court after due consideration thereof, sustained.

Ordered that exception of said defendant be, and hereby is, noted.

(Note: Hon. C. B. Faris, U. S. District Judge ruled on above motion)

(No. 14 of deft's praecipe)

111 The Court: I have not read with the very greatest care the allegations on which counsel for plaintiff were striking, but I know generally, of course, from the argument of counsel respectively and from casual examination of the matter struck out, what it is sought respectively to do. Again, it is a matter of the very greatest regret that this Court is turned loose without legal authority or compass to eke out details and procedure embraced in less than four lines of the Act of May 15, 1928. When you cite a Missouri case or when you call my attention to the settled law and policy of Missouri, I don't know whether to apply them or not. All counsel before me in this case except Mr. Weber, have assumed to either mention the Missouri Statute or a Missouri decision.

I don't know whether they apply or not. I can't tell

112 until the Court of Appeals has gone further and construed other provisions of eked out of the practice a

procedure, out of circumambient atmosphere, as it were; you have got to go to the circumambient atmosphere to get it because the Statute furnishes you no consolation. Now, if it

were to be decided according to what I deem to be the Missouri holdings upon the point, it is clear, I think, that in order

to raise a question such as is attempted to be raised here by the defendant, it must have been timely done, because, reverting now, perhaps uselessly, to what the Supreme Court of

Missouri has said upon the subject, the very right to maintain a suit on the part of the plaintiff is bottomed upon the fact

that plaintiff and defendant have been wholly unable to get together. If they have gotten together, you cannot under the

Missouri practice and cases and Statutes, maintain any suit whatever. It is a matter of jurisdiction wholly, because not only must you allege, but prove, if it be contradicted, that plaintiff and defendant have been wholly unable to agree, in order that you may at all maintain the action of condemnation. I assume, perhaps, by what I am saying, that the law everywhere ought to be this way because nowhere ought a plaintiff to be required to file, and a Court to be vexed with, any vain and futile and unnecessary proceeding. So I take it if plaintiff and defendants have gotten together and have finally agreed upon this matter, then this Court has no jurisdiction to maintain this suit.

113 Now, when and where and how should that step have been reached? Clearly, it should have been reached somewhere before the filing of exceptions on the part of the defendants. It ought to have taken the form or nature of a plea; still, perhaps that would have made very little difference; but it ought to have been raised then and should have been raised then. Now, that's one reason why I think that I ought to sustain this Motion, because it was raised at the wrong time and that is to say, untimely; and that defendants may well be regarded to have waived it by filing their exceptions.

Now, as suggested by counsel for plaintiff in this case, the proceeding has no earmarks whatever of a counterclaim because, as counsel Weber says, the Government owes this man nothing. Upon its suit it will be compelled to become a debtor of the defendant, but under no circumstances does it owe him anything on which he can counterclaim anything. Perhaps, I am not sure, perhaps it is not relevant—if I were sure—nothing perhaps could prevent the defendant from going into the Court of Claims, as the Three States Lumber Company, I am advised, has done. Perhaps if he had done that, a comity might have existed between this Court and that one, which might have dominated one of the two actions. I see no earmarks at all of a counterclaim in this case.

I am not satisfied that the decision of the Supreme Court in the Thekla case in 266 U. S. covers the situation particularly. There the question was involved, not of jurisdiction bottomed upon the right to sue, but of jurisdiction
114 bottomed upon consent to be sued. You have your jurisdiction bottomed upon both. Certainly there is no provision anywhere to be found in the law permitting the Government to be sued in this case, unless it arises out of the Tucker Act. If it does not arise out of the Tucker Act, it is non-existent. So first, the defendants are asking the Gov-

ernment to permit itself to be sued in this Court without its consent; and second, they are asking the Government to permit itself to be sued for more than ten thousand dollars, which is the fixed jurisdiction of this Court. Of course the two questions are germane, I am frank to concede, but as distinguished from the Thekla Steamship case; there is one question there and two questions here, so I think for both of those reasons, and perhaps for others—if I were not too hurried—the motion to strike ought to be sustained. I am not adverting to the peculiar form of the law or the alleged accord in the case, not at all, but if I were to mention that, I would raise a serious question as to whether ever the Government of the United States, when acting through its appointed authorities, can agree to limit the jurisdiction of this Court by saying an action shall be friendly, but when it comes up to be tried it is shown not to be friendly at all; by telling this Court, in other words, that I shall be friendly when I have no authority to be friendly when the law in this case shows it is my duty to be unfriendly when I am passing on that Motion to Strike. The Motion will be sustained.

Mr. London: May I save an exception, Your Honor, please?

115 The Court: Certainly.

Mr. London: Does that include both the Answer and Counterclaim, so that the record will be clear on that?

The Court: Yes.

116 Motion to Vacate Award of Viewers, To Set Aside Findings of Fact, Interlocutory Decree and Appointment of Viewers, and for Judgments on Tracts #243 and #281.

(Filed Oct. 18, 1934)

Now comes the defendant, William H. Danforth, and moves the Court to set aside and vacate the award of the viewers heretofore filed in the above cause on May 4, 1934, in the sum of \$20,409.90 as to Tract #243, and \$967.75 as to Tract #281, and to set aside the findings of fact and the interlocutory decree entered herein on February 7, 1934, and to set aside the order appointing the viewers in the said cause as to the said tracts #243 and #281 heretofore entered by the Court on the 7th day of February, 1934, and to set aside and vacate all of the steps or actions taken by the said viewers in connection with the said two tracts, and to substitute

in lieu of the said awards judgments in the sum of \$31,681.98, together with interest at the rate of 6% from such time as the Court finds the defendant is entitled to same, as to Tract #243, and \$2,208.94, together with interest at the rate of 6% from such time as the Court finds the defendant is entitled to same, as to Tract #281, the said judgments to recite that the said sums are to be paid into the registry of the Court by the plaintiff for the benefit of the defendants, and that upon the payment into the registry of the Court of the said sums of \$31,681.98 and interest as to Tract #243 and \$2,208.94 and interest as to Tract #281, that the Court enter judgment for plaintiff for easements over the said tracts of land as prayed in plaintiff's petition, and/or the said defendant is ready and willing and herewith tenders easements over the said tracts upon payment into Court of the said sums of money, together with interest.

As grounds for said motion the said defendant states that he is the owner of the said Tracts #243 and #281 as set out in the plaintiff's petition in the above cause now pending in this Court, which tracts are correctly described in plaintiff's petition, and which descriptions are herewith adopted by reference and made a part of this motion as fully as though the same were herein fully set out; that the petition filed in this cause by the plaintiff was filed on or about the 22nd day of September, 1933, for the alleged purpose of condemning easements for flowage rights over the said two (2) tracts of land; that prior to the filing of the said suit by the said plaintiff, the plaintiff, The United States of America, and the defendant, William H. Danforth, owner of the said tracts, entered into written contracts covering the said two tracts of land, whereby the plaintiff made a written offer of settlement as to each tract of land for the damages to the said tracts, and for the purchase of easements over the said two (2) tracts of land for floodway purposes; that the said offers were duly accepted in writing by the said defendant within the time authorized by plaintiff; that plaintiff and the said defendant expressly fixed and agreed upon the damages in the sum of \$31,681.98 for a perpetual flowage easement over Tract #243 and in the sum of \$2,208.94 for a perpetual flowage easement over Tract #281; that the said written offers on the said two (2) tracts were made by the plaintiff on or about the 14th day of January, 1932, in the form of letters, dated January 14, 1932; that thereafter, at defendant's request, the plaintiff extended in writing, the time for acceptance until March 15, 1932; that on the 2nd day of March, 1932, the defendant

duly accepted, in writing, the said offers of the said plaintiff on the said two tracts of land; that the said offers
118 and acceptances were contained in the following letters, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 243, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of

offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

Incls.—

Tract Map;
General map of floodway;
Addressed return envelope.

Accepted:

Wm. H. Danforth
(Owner)

c/o Purina Mills
St. Louis, Mo.
(Address)

March 2, 1932
(Date)

119

“War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Two thousand two hundred eight and 94/100—Dollars (\$2,208.94) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 281, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title can-

not be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

Incls.—

Tract Map;

General map of floodway;

Addressed return envelope.

Accepted:

Wm. H. Danforth
(Owner)

c/o Purina Mills
St. Louis, Mo.
(Address)

March 2, 1932
(Date)."

120. As further grounds the said defendant states that the said contracts were entered into by the plaintiff and the said defendant pursuant to the Floodway Control Act of May 15, 1928, duly approved on the said 15th day of May, 1928, by the Congress of the United States, under which the Secretary of War was authorized to either cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights-of-way which in the opinion of the said Secretary of War and the Chief of Engineers, are needed for carrying out the project mentioned in the said Act, or which authorized the said Secretary of War to purchase such lands, easements or rights-of-way when the owner of any such land, easement, or right-of-way should fix a price for the same which in the opinion of the Secretary of War was reasonable; that the said parts of the said Act applicable are as follows:

"The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining

the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price;"

That pursuant to the said Act of Congress, and pursuant to law, the plaintiff and the defendant entered into the afore-said contracts and the method of procedure in the form of friendly condemnation proceedings was requested by said plaintiff and the proceedings were instituted by the plaintiff solely for its own benefit and its own convenience and for the purpose of clearing title to the said easements by taking judgments in condemnation proceedings, all in pursuance to the provisions as set out in the said contracts.

121 Wherefore, the said defendant, William H. Danforth, moves and prays the Court as above set out.

LEAHY, SAUNDERS &
WALTHER & J. L. LONDON

Attorneys for Defendant,
William H. Danforth.

Cape Girardeau, Mo. Dated October 18, 1934. Received
copy of within Notice. L. John Weber, Special Assistant
to the U. S. Attorney.

Endorsed: Filed Oct. 18, 1934. Jas. J. O'Connor, Clerk.

122

Term Bill of Exceptions.

(Filed Oct. 22, 1934.)

In the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,

Case No. 716. vs.

Beatrice McDaniel, et al., Defendants.

Tracts No. 243 and No. 281.

Be It Remembered that during the October Term, 1934, of the above entitled court, and on to-wit: October 8, 1934, the plaintiff filed its motion to strike from the files answer and counterclaim of defendant William H. Danforth as to Tracts 243 and 281, which said motion was in words and figures as follows, to-wit:

(Clerk here insert said Motion filed October 8, 1934).

(Heretofore already made part of record.)

And afterwards, to-wit: on October 15, 1934, and during the October Term, 1934, of said Court, the said Motion coming on to be heard by the Court, was by the Court sustained, to which action of the Court in sustaining the said motion, the said defendant, William H. Danforth, by his counsel, then and there at the time, duly excepted.

And, inasmuch as the foregoing matter does not appear of record, and that the same may be preserved and presented on appeal, during the said October Term, 1934, the said defendant tenders this, his Term Bill of Exceptions herein, and prays that the same may be allowed, signed, sealed, filed and made a part of the Record herein, which is accordingly done October 20th, 1934, a day of the October Term, 1934, of the said Court.

C. B. FARIS,

Judge.

Endorsed: Filed Oct. 22, 1934. Jas. J. O'Connor, Clerk.

123

Term Bill of Exceptions.

(Filed Oct. 22, 1934.)

In the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff.

Case No. 716. vs.

Beatrice McDaniel, et al., Defendants.

Tract No. 243.

Be It Remembered that during the October Term, 1934, of the above entitled court, and on to-wit: October 12, 1934, the defendant, William H. Danforth, filed his motion to amend exceptions, which said motion was in words and figures as follows, to-wit:

(Clerk here insert said Motion filed October 12, 1934).

(Heretofore already made part of record.)

And afterwards, to-wit: on October 12, 1934, and during the October Term, 1934, of said Court, the said Motion coming on to be heard by the Court, was by the Court overruled as to amending that part of the exceptions filed June 4, 1934, by adding after the word "award", at the bottom of page 2,

in paragraph "1." the quotation set forth in the motion, to which action of the Court in overruling said portion of the said motion, the said defendant, William H. Danforth, by his counsel, then and there at the time, duly excepted.

And, inasmuch as the foregoing matter does not appear of record, and that the same may be preserved and presented on appeal, during the said October Term, 1934, the said defendant tenders this, his Term Bill of Exceptions herein, and prays that the same may be allowed, signed, sealed, filed and made a part of the Record herein, which is accordingly done October 20th, 1934, a day of the October Term, 1934, of the said Court.

C. B. FARIS,
Judge.

Endorsed: Filed Oct. 22, 1934. Jas. J. O'Connor, Clerk.

124 (Motion of William H. Danforth for leave to amend Motion to vacate Award of Viewers.)

(Filed October 26, 1934.)

Now comes defendant, William H. Danforth, and moves the Court to permit him to amend the Motion to Vacate award of viewers, heretofore filed on October 18, 1934, as follows:

In the heading, by adding after the word "aside" in the first line, the following:

"findings of fact, interlocutory decree, and",
so that the same may read:

"Motion to vacate award of viewers, to set aside findings of fact, interlocutory decree, and appointment of viewers, and for judgments on Tracts #243 and #281."
and

By inserting after the words "set aside the" in the fourth line on page 1, the following:

"findings of fact and the interlocutory decree entered herein on February 7, 1934, and to set aside the"

LEAHY, SAUNDERS & WALTHER,
& J. L. LONDON,

Attorneys for Defendant,
William H. Danforth,

Endorsed: Filed Oct. 26, 1934. Jas. J. O'Connor, Clerk.

- 125 (Order granting Leave to William H. Danforth for leave to amend Motion to Vacate Award of Viewers.)

October 26, 1934.

Now come the parties in the above entitled cause, by their respective attorneys; thereupon, Wm. H. Danforth, one of the defendants herein, is by the court granted leave to amend his motion to vacate award of Commissioners, as to Tracts 243 and 281, heretofore filed on October 18, 1934, by interlineation, as set out in his motion to amend, this day filed.

Entered: October 26, 1934. Jas. J. O'Connor, Clerk.

- 125a (Order overruling Motion of William H. Danforth to vacate Award of Viewers, to set aside Findings of Fact, Interlocutory Decree and Appointment of Viewers, and for Judgments, etc.)

United States District Court, Eastern Division of the Eastern
Judicial District of Missouri.

U. S. A.,
No. 716 vs.
Beatrice McDaniel, et al.

....., 193

Memorandum for Clerk.

Motion of William H. Danforth to vacate award of viewers to set aside findings of fact, the interlocutory decree, the appointment of viewers, and for judgment on tracts numbered 243 and 281, overruled, for the reason that the subject matter of said motion should have been presented by answer, and the present motion has been untimely filed and presented. Exception noted by defendant.

CHAS. B. DAVIS,
Judge.

Filed Oct. 21, 1935, Jas. J. O'Connor, Clerk.

(Note: This motion was signed and submitted April 8, 1935.)

MICRO CARD

TRADE

MARK



22

39



1642

65



126 (Stipulation that Memorandum filed October 12, 1934, may be corrected.)

(Filed October 26, 1935.)

It is stipulated between the plaintiff the United States of America and the defendant Wm. H. Danforth, as to Tract No. 243, that the memorandum heretofore filed on October 12, 1934 in this cause may be corrected by the court at St. Louis, Missouri by an order nunc pro tunc directing and ordering that in lines 13 and 14 on page 1 of said memorandum, the number "281" in each line respectively be changed to read "243"; and that in the said memorandum in line 5 on page 2 thereof the number "281" may be changed to read "243", so that the designation and reference to the tract will appear throughout said memorandum correctly as to Tract No. 243.

L. JOHN WEBER,

Special Asst. to the U. S. Attorney,
Attorney for Plaintiff.

J. L. LONDON,

Attorney for defendant Wm. H. Danforth.

Dated this, the 26th day of October, 1935.

127 Order Sustaining Plaintiff's Exceptions to Awards of Viewers as to Tracts Nos. 243 and 281; and Setting Aside and Vacating the Viewers' Awards as to Said Facts.

(Filed January 28, 1936.)

And now the viewers, R. L. Shelby, E. C. Davis and E. F. Deal, heretofore appointed by this Court in this cause, on the 4th day of February, 1934, having on the 4th day of May, 1934, in furtherance of their duties, made proper and legal return and report awarding damages as to said Tract No. 243 in the sum of \$20,409.90 and as to said Tract No. 281 in the sum of \$967.75;

And the plaintiff, the United States of America, having on the 9th day of May, 1934, and within the time and in the way and manner prescribed by law, duly excepted to the report of said viewers as to said Tracts Nos. 243 and 281, by filing its written exceptions in this court in this cause; and the defendant William H. Danforth having on the 4th day of June, 1934 duly filed its exceptions to the report of said viewers as to said Tracts Nos. 243 and 281;

And the said exceptions having on the 23rd day of October, 1935 come on regularly for a hearing by this Court, upon due notice to all parties interested, the plaintiff, the United States of America appearing by its attorneys of record, and the defendants as to said Tracts Nos. 243 and 281 appearing by their attorneys of record;

And the Court having heard and duly considered the evidence offered at said hearing on the part of both the plaintiff and the defendants, as to said Tracts Nos. 243 and 281, and being fully advised in the premises, does find as follows:

That the awards of said viewers as contained in their report as to said Tracts Nos. 243 and 281 are excessive, and the exceptions thereto filed by the plaintiff should be sustained; and that the exceptions thereto filed by the defendant William H. Danforth should be overruled;

That the said awards as to said Tracts Nos. 243 and 281 should be vacated and set aside and a new appraisal of damages, if any, and benefits, if any, resulting from the appropriation described in plaintiff's petition, as to each of said tracts, should be had; and to that end, that new viewers should be appointed in the premises, or the matter of damages should be re-referred to the same board of viewers for a new appraisal;

Wherefore, it is ordered and adjudged that the exceptions of the defendant William H. Danforth herein filed as to said Tracts Nos. 243 and 281 should be and the same are overruled; that the exceptions of the plaintiff herein filed as to said Tracts Nos. 243 and 281 should be and the same are hereby sustained; that the awards of damages contained in the said report of viewers filed on the 4th day of May, 1934 should be and the same are hereby set aside and vacated; that a new appraisal of damages, if any, and benefits, if any as to each of said Tracts Nos. 243 and 281 should be had and the same is hereby ordered and adjudged, with the provision that for the purpose of making said appraisal of said tracts, appraisers shall be appointed by this court upon application filed in this cause by the parties entitled thereto.

CHARLES B. DAVIS,
United States District Judge.

Dated this, the 28th day of January, 1936.

Endorsed: Filed Jan. 28, 1936. Jas. J. O'Connor, Clerk.

130

Term Bill of Exceptions.

(Filed March 30, 1936.)

In the District Court of the United States for the South-eastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,
Case No. 716. vs.
Beatrice McDaniel, et al., Defendants.

Tracts No. 243 and No. 281.

Be It Remembered that on the 8th day of April, 1935, the defendant, William H. Danforth, filed his motion to vacate the award of viewers, to set aside findings of fact, interlocutory decree and appointment of viewers, and for judgments on tracts No. 243 and No. 281; that the same was heard, argued and submitted; that thereafter during the October Term, 1935, and on to-wit: the 21st day of October, 1935, the said motion of the said William H. Danforth to vacate the award of viewers, to set aside findings of fact, interlocutory decree and appointment of viewers, and for judgments on tracts No. 243 and No. 281, was overruled. The said motion is in words and figures as follows, to-wit:

(Clerk here insert said motion filed * April 8th, 1935, and overruled on the 21st day of October, 1935.)

Motion filed Oct. 18, 1934, and modified Oct. 26, 1934, heretofore made part of record.

And afterwards, and on October 23, 1935, there was a final hearing before the Court on the exceptions of the plaintiff to the report of the commissioners as to tracts No. 243 and No. 281, which hearing was concluded on the 25th day of October, 1935, during the October Term, 1935, at which term the said cause was argued and submitted.

And thereafter, to-wit: on the 28th day of January, 1936, the Court sustained the exceptions of the plaintiff to
131 the award of the commissioners as to the said tracts No. 243 and No. 281, to which action of the Court in sustaining the said exceptions filed by the plaintiff to the award of the viewers as aforesaid the defendant, William H. Danforth, by his counsel, then and there duly excepted.

*Note: This motion was filed Oct. 18, 1934, modified Oct. 26, 1934 and signed and submitted April 8, 1935, and overruled Oct. 21, 1935.

And, inasmuch as the foregoing matter does not appear of record, and that the same may be preserved and presented on appeal, during the said October Term, 1935, the said defendant tenders this, his Term Bill of Exceptions herein, and prays that the same may be allowed, signed, sealed, filed and made a part of the Record herein, which is accordingly done March 28, 1936, a day of the October Term, 1935, of the said Court.

CHARLES B. DAVIS,

Judge.

Endorsed: Filed Mar. 30, 1936, Jas. J. O'Connor, Clerk.

132 Order Appointing New Commissioners as to Tracts
Nos. 243 and 281.

(Filed April 10, 1936.)

In the United States District Court, Eastern District of
Missouri, Southeastern Division.

United States of America, Plaintiff,

No. 716. vs.

Beatrice McDaniel, et al., Defendants.

(Tracts Nos. 243 and 281.)

Now on this, the 9th day of April, 1936, comes the plaintiff, the United States of America, by its attorneys of record, and presents its oral motion showing that heretofore and on the 28th day of January, 1936, an order was entered in this cause, setting aside and vacating the viewers' awards as to Tracts Nos. 243 and 281, and which motion prays for the appointment of new commissioners to determine the damages and benefits to ensue from the condemnation herein of the said tracts.

That the said land is more particularly described as follows:

Tract No. 243, being:

(Heretofore described at marginal page 35 of this printed record.)

133 And it appearing to the Court that the said plaintiff is entitled to have viewers appointed in accordance with its motion;

It is therefore ordered that Messrs. Stephen Barton, Joseph E. Schmuke and John H. King, residents of the Southeastern Division of the Eastern Judicial District of Missouri, and being otherwise qualified by law to act, be

and the same are hereby appointed commissioners or viewers to view the said premises for the purpose of ascertaining and assessing the compensation, if any, to which the said defendants shall be entitled for the easement herein condemned, and the resulting damages to the said property, if any, which may be sustained by the respective owners or persons claiming an interest therein also to ascertain any special benefits to said property on account of the establishment of said floodway, in the amount that such property shall be benefited by its establishment, if any, and to assess the balance of said value and damages over and above the amount of such special benefits assessed against the plaintiff, and make their report under oath to the undersigned without unnecessary delay.

It is further ordered that the Clerk of the United States District Court for the Eastern District of Missouri, Southeastern Division, shall prepare copies of this order and cause the same to be served upon the commissioners; and

It is further ordered that said commissioners shall receive and be paid for the services herein designated for them to perform at the rate of \$20.00 per day, per each; for such time as they shall be actively employed in the performance of the said services together with compiling and making of their report.

CHARLES B. DAVIS.

Dated this, the 9th day of April, 1936.

Filed: April 10, 1936, Jas. J. O'Connor, Clerk.

135

(Recital.)

The Record does not show filing of exceptions of defendant Danforth of April 10, 1936, to order appointing viewers, as in praecipe No. 20.

136 Commissioners' Report as to Tracts Nos. 243 and 281.

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
No. 716. vs.

Beatrice McDaniel, et al., Defendants.

To the Judge and Clerk of the United States District Court, Eastern District of Missouri, Southeastern Division:

(Filed May 29, 1936.)

The undersigned Commissioners duly appointed by the Judge of the United States District Court for the Eastern

District of Missouri, Southeastern Division, on the 10th day of April, 1936, to view the lands hereinafter described and appraise the damages sustained to said premises on account of the acquirement by condemnation of a perpetual easement and privilege to overflow by diversion of excessive flood waters from the Mississippi River, certain lands known as the floodway area, as provided for by the Act of Congress of May 15, 1928, and known as House Document No. 90, also to appraise the benefits accruing to said premises because of the aforesaid action; and the said commissioners being resident freeholders of S. E. Div. of E. District of Missouri, and disinterested in the matters and things above stated, and having first subscribed to the usual and required oath, and being qualified by law to serve as such Commissioners, do respectfully report:

That in obedience to the order of the said Court we did proceed to view the lands hereinafter described and appraise the damages and benefits sustained to said premises because of the aforesaid action, and that the description of the premises is as follows:

Tract No. 243, being:

137 (Heretofore described at Marginal page 35 of this printed record.)

139 That we hereby assess damages for Tract No. 243 in the sum of \$8,428.25; That we hereby assess benefits for Tract No. 243 in the sum of \$

140 That because of the conflicting interests of such parties, your Commissioners do not make any report as to the ownership respectively of defendants, in said premises or the proportionate rights or claims therein of any of said defendants.

The undersigned Commissioners, Stephen Barton, J. H. King, and J. E. Schmuke, as aforesaid, being duly sworn, upon their oath, state that the matters and things hereinbefore stated are true to the best of their knowledge and belief and that they have to the best of their abilities viewed the

lands and assessed the damages and benefits to said premises, as hereinbefore set forth.

STEPHEN BARTON,

J. H. KING,

J. E. SCHMUKE,

Commissioners.

Subscribed and sworn to before me this 29 day of May, 1936.

(Seal)

U. S. Dist. Court

East. Jud. Dist.

of Mo.

East. Div.

JAS. J. O'CONNOR,

Clerk of the U. S. District Court.

By James M. Arnold,

Deputy.

Endorsed: Filed May 29, 1936, Jas. J. O'Connor, Clerk.

141A (Renewal of Motion of William H. Danforth to vacate Award of Viewers to set aside Findings of Fact, Interlocutory decree, and Appointment of Viewers and for Judgment, etc.)

(Filed August 5, 1936.)

In the United States District Court
Eastern District of Missouri
Southeastern Division

United States of America, Plaintiff,

Case No. 716 vs.

Beatrice McDaniel, et al., Defendants.

Tract No. 243.

Now comes the defendant, William H. Danforth, and renews the motion heretofore filed on or about the 8th day of April, 1935, and overruled on or about the 21st day of October, 1935, to vacate the award of the viewers, to set aside the finding of facts, the interlocutory decree, the appointment of viewers, and for judgment in the sum of \$31,681.98, for the reasons set out in the said motion to vacate the said award of the viewers and to enter up judgment, and particularly on the ground that the parties reached an accord as to the extent of the damages and agreed upon the damages in the sum of \$31,681.98.

LEAHY, WALTHER,

HECKER & ELY,

J. L. LONDON,

Attorneys for Defendant,

William H. Danforth.

Note: The motion renewed was filed Oct. 18, 1934 and subsequently signed April 8, 1935 and overruled Oct. 21, 1935.

142 (Exceptions of William H. Danforth to Report
of Viewers.)

(Filed August 5, 1936.)

Comes now William H. Danforth, a resident of St. Louis, Missouri, and objects and excepts to the report of the viewers Stephen Barton, J. H. King and J. E. Schmucke, which report was filed on the 29th day of May, 1936, and as grounds of his exceptions states:

1. That the said viewers and each of them were without jurisdiction or power to render an award.

2. That the Court was without jurisdiction or power to appoint the viewers.

3. That the plaintiff and the defendant, William H. Danforth, had reached an accord as to the extent of the damages and had entered into a written contract prior to the appointment of any viewer in this cause, and more particularly prior to the appointment of the viewers Stephen Barton, J. H. King and J. E. Schmucke, in which contract the said plaintiff and the said defendant William H. Danforth had agreed upon a settlement for damages as to Tract #243 in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98); that the said contract was in the form of an offer made by the plaintiff, through its duly authorized agent, which said offer was dated January 14, 1932; that the said offer was

143 duly extended by plaintiff and was duly accepted by the defendant, William H. Danforth, on March 2, 1932, within the time allowed by plaintiff for acceptance; that under the terms of the said contract only friendly condemnation proceedings were to be instituted, with a request to the Court for an agreed verdict, and merely for the purpose of clearing title; that the said offer and acceptance were in the following language, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid
Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98), for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

Incls.—

Tract map;
General map of floodway;
Addressed return envelope.

144

"Accepted:

Wm. H. Danforth,
(Owner)
c/o Purina Mills
St. Louis, Mo.
(Address)
March 2, 1932
(Date)."

4. Because the award of the said viewers is based upon erroneous principles of law and of valuation of the land in question.

5. Because the said viewers were biased in favor of the Government.

6. Because the report of the viewers shows on its face that the said viewers, and each of them, were prejudiced against the defendant, William H. Danforth, and biased in favor of the government.

7. Because the award of the viewers is grossly inadequate and is not a fair and just compensation for the properties taken and property affected and damaged by the flowage rights demanded and required by the Government over this defendant's land.

8. Because the said viewers did not, in arriving at the amount of their award, take into consideration and allow compensation for the fact that the flowage would cause damage to the whole tract and would destroy a large part of the same.

9. Because the said viewers gave no opportunity to this defendant to be heard and failed to notify this defendant of any hearing before the said viewers.

10. Because the award of the said viewers is improper in form as well as in substance.

11. Because the said viewers failed to take into consideration, in arriving at their award, proper, legal and just elements of compensation and damage.

12. Because the Court erred in striking from the files on October 15, 1934, the answer and counterclaim of the
145 defendant William H. Danforth as to Tract #243, to which action of the Court in sustaining the said motion to strike the said defendant, William H. Danforth, duly excepted.

13. Because the Court erred in overruling, in part, the motion of the defendant, William H. Danforth, to amend the exceptions, which motion was filed on or about the 12th day of October, 1934.

14. Because the Court erred in overruling on October 18, 1934, the motion of the defendant, William H. Danforth, to vacate the award of the viewers, to set aside the appointment of the viewers, and for judgment in the sum of \$31,681.98, which had been duly agreed upon between plaintiff and the said defendant, William H. Danforth, to which action of the Court the defendant duly excepted.

15. Because the Court erred in overruling on October 21, 1935, the motion of defendant, William H. Danforth, as amended, to vacate the award of the viewers, to set aside the finding of facts, the interlocutory decree, the appointment of viewers and for judgment, to which action of the Court said defendant, William H. Danforth, duly excepted.

16. Because the Court erred in sustaining the exceptions of the plaintiff as to the award of the viewers as to Tract #243, and erred in entering an order sustaining plaintiff's exceptions, to which action of the Court said defendant, William H. Danforth, duly excepted.

17. Because the Court erred in appointing, on or about the 10th day of April, 1936, viewers as to Tract #243, the said viewers being Stephen Barton, J. H. King and J. E. Schmucke.

18. Because the Court erred in receiving the report of the viewers Stephen Barton, J. H. King and J. E. Schmucke as to Tract #243 on or about the 29th day of May, 1936.

19. Because the Court should have sustained the motion of defendant William H. Danforth for judgment and should have awarded flowage rights to plaintiff and entered up an award in the sum of \$31,681.98 as to Tract #243.

Wherefore, defendant William H. Danforth prays the Court to sustain his exceptions and vacate and set aside the award of the said viewers, and that the Court either appoint new viewers with instructions from the Court to enter up an award in the sum of \$31,681.98, the amount agreed to be paid by plaintiff as set forth in Paragraph 3 of these exceptions, or that the Court enter up a judgment

in the said sum of \$31,681.98 in favor of the defendant William H. Danforth and against the plaintiff.

LEAHY, WALTHER, HECKER & ELY & J. L. LONDON,
Attorneys for Defendant,
William H. Danforth.

Received copy this August 5, 1936. L. John Weber, Special Attorney, Dept. of Justice, 935 New Federal Bldg., St. Louis, Mo.

Endorsed: Filed Aug. 5, 1936. Jas. J. O'Connor, Clerk.

147

(Recital.)

The Record does not show filing of Term Bill of Exceptions following motion filed August 5, 1936, to vacate award of Viewers, etc., as requested in praecipe No. 30.

148

(Recital of Resubmission to Court of Motion of William H. Danforth for Judgment and overruling thereof.)

Entered October 23, 1936.

Come now the parties herein by their respective attorneys; whereupon, the motion of defendant for judgment in this cause is now taken up and resubmitted to the Court, and by the Court after due consideration thereof, overruled. Thereupon, the final hearing of this cause before the Court on the separate exceptions of the defendant, Wm. H. Danforth, to the award of commissioners as to Tracts No. 243 and No. 281, is begun and concluded, and said cause is now submitted to the Court.

Note: Hon. Chas. B. Davis sat as United States Judge.

149

(Order Sustaining Exceptions of William H. Danforth for the Reason that the Award is Inadequate.)

(Filed October 24, 1936.)

Tract 243.—1033.56 Acres. Award.—\$8428.25

Defendant's exceptions sustained for the reason that the award is inadequate.

CHARLES B. DAVIS,
U. S. District Judge.

Entered Oct. 24, 1936.

Attest:

A true copy,
(Seal)

JAS. J. O'CONNOR, Clerk.

150 Order Appointing New Commissioners as to Tract
No. 243.

(Filed November 28, 1936.)

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
No. 716. vs.

Beatrice McDaniel, et al., Defendants.

(Tract No. 243)

Now on this, the 28th day of Nov. 1936, comes the plaintiff, the United States of America, by its attorneys of record, and presents its oral motion showing that heretofore and on the 24th day of October, 1936, an order was entered in this cause setting aside and vacating the viewers' award as to Tract No. 243, and which motion prays for the appointment of new commissioners to determine the damages and benefits to ensue from the condemnation herein of the said tract.

That the said land is more particularly described as follows:

(Heretofore described at Marginal Page 35 of this printed record.)

151 And it appearing to the Court that the said plaintiff is entitled to have viewers appointed in accordance with its motion:

It is therefore ordered that Messrs. Stephen Barton, Joseph E. Schmuke and John H. King, residents of the Southeastern Division of the Eastern Judicial District of Missouri, and being otherwise qualified by law to act, be and the same are hereby appointed commissioners or viewers to view the said premises for the purpose of ascertaining and assessing the compensation, if any, to which the said defendants shall be entitled for the easement herein condemned, and the resulting damages to the said property, if any, which may be sustained by the respective owners or persons claiming an interest therein; also to ascertain any special benefits to said property on account of the establishment of said floodway, in the amount that such property shall be benefited by its establishment, if any, and to assess the balance of said value and damages over and above the amount of such special benefits assessed against the plaintiff, and make their report under oath to the undersigned without unnecessary delay.

It is further ordered that the Clerk of the United States District Court for the Eastern District of Missouri, Southeastern Division, shall prepare copies of this order and cause the same to be served upon the commissioners; and

152 It is further ordered that said commissioners shall receive and be paid for the services herein designated for them to perform at the rate of \$20.00 per day, per each, for such time as they shall be actively employed in the performance of the said services together with compiling and making of their report.

CHARLES B. DAVIS,
United States District Judge.

Dated this, the 28th day of Nov. 1938.

Filed Nov. 28, 1936. Jas. J. O'Connor, Clerk.

153

(Recital.)

The Record does not show filing of "Term Bill of Exceptions" filed Nov. 30, '36, as called for in praecipe No. 35.

154 (Report of Commissioners as to Tract No. 243.)

(Filed March 11, 1937.)

In the United States District Court, Eastern District of Missouri, Southeastern Division

United States of America, Plaintiff,

No. 716. vs.

Beatrice² McDaniel, et al., Defendants.

(Tract No. 243)

To the Judge and Clerk of the United States District Court, Eastern District of Missouri, Southeastern Division:

The undersigned Commissioners duly appointed by the Judge of the United States District Court for the Eastern District of Missouri, Southeastern Division, on the 28th day of November, 1936, to view the lands hereinafter described as Tract No. 243, and appraise the damages sustained to said premises on account of the acquirement by condemnation of a perpetual easement and privilege to overflow by diversion of excessive flood waters from the Mississippi River, certain lands known as the floodway area, as provided for by the Act of Congress of May 15, 1928, and known as House Document No. 90, also to appraise the benefits accruing to said premises because of the aforesaid action; and the said commis-

sioners being resident freeholders of Southeastern Division of the Eastern Judicial District of Missouri, and disinterested in the matters and things above stated, and having first subscribed to the usual and required oath, and being qualified by law to serve as such Commissioners, do respectfully report:

That in obedience to the order of the said Court we did proceed to view the lands hereinafter described and appraise the damages and benefits sustained to said premises because of the aforesaid action, and that the description of the premises is as follows:

155 (Heretofore described at marginal page 35 of this printed record.)

That we hereby assess damages for Tract No. 243 in the sum of \$20409.90; That we hereby assess benefits for Tract No. 243 in the sum of \$.....

156 That we hereby assess damages for Tract No. 243 in the sum of \$17,921.70; that we hereby assess benefits for Tract No. 243 in the sum of \$.....

That because of the conflicting interests of such parties your Commissioners do not make any report as to the ownership respectively of defendants, in said premises or the proportionate rights or claims therein of any of said defendants.

The undersigned Commissioners, Stephen Barton, J. E. Schmuke and J. H. King, as aforesaid, being duly sworn, upon their oath, state that the matters and things hereinbefore stated are true to the best of their knowledge and belief and that they have to the best of their abilities viewed the lands and assessed the damages and benefits to said premises, as hereinbefore set forth.

STEPHEN BARTON,
J. E. SCHMUKE,
J. H. KING.

Subscribed and sworn to before me this 11th day of March, 1937.

JAS. J. O'CONNOR,
Clerk of the U. S. District Court.
By: James M. Arnold,
Deputy Clerk.

(Seal)

Endorsed: Filed Mar. 11, 1937. Jas. J. O'Connor, Clerk.

157 Plaintiff's Exceptions to Viewers' Report Filed
March 11, 1937, as to Tract No. 243.

(Filed March 30, 1937.)

Comes now the plaintiff and excepts to the findings of the viewers heretofore appointed by the Court to view the property described in the petition filed in this cause, designated as Tract No. 243, as contained in their report filed in this cause on March 11, 1937, and files its said exceptions with the Clerk of this Court. The plaintiff excepts to the findings of the said viewers for the following reasons among others, to-wit:

That the amount found as assessed damages alleged to have been suffered by the defendants because of the condemnation of an easement for-flowage rights over said property described in this cause as Tract No. 243 is excessive, exorbitant, and inconsistent with the facts;

That the said findings are inconsistent with the findings in other cases under the same state of facts and conditions in proceedings of like nature concerned in the levee and flood-way project described in the petition;

That the findings are against the weight of evidence;

That the said viewers placed an excessive and exorbitant value upon the real estate condemned;

That the said viewers failed to be governed by the law in such cases made and provided in that they failed to value said premises according to the market value thereof at the time of filing the said petition, or at the time of making said report;

That the value of the improvements placed upon said premises is in excess of their actual value and that the damages allowed therefor are in excess of what will be sustained to said improvements;

158. That the findings are indefinite and uncertain and that the plaintiff is not definitely and adequately informed as to the nature of the damages to said premises and improvements thereon, and the manner in which such damages apply and how applied;

That the said viewers have considered elements of damage such as speculative or resale values, contrary to law;

That the said viewers have proceeded upon the theory that the condemnor is liable for damages resulting from overflow of the lands under condemnation, from crevasses in said riverside levee at points other than at the point designated as the fuse plug section, which is contrary to the letter and spirit of the Floodway Act, and for damages resulting from the overflow from said Mississippi River upon the said lands occasioned by other than the acts of this condemnor in diverting excessive flood waters from said river, to all of which the condemnor excepts;

That in arriving at the designated amount fixed by the report as damages, the said viewers have wholly failed to consider the periods or frequency of such overflow that would be due directly to the operation of the project as defined in the petition;

That the said viewers were and are actuated and governed in their findings by bias and prejudice against this sovereign plaintiff and the said project, and are partial to and in behalf of the person or persons owning the premises described in their said report;

That the award by the viewers as to said Tract No. 243 is excessive and exorbitant in that the said viewers awarded to the defendant owners of said Tract No. 243 a sum more than \$1000.00 in excess of the amount of damages which the said owners will suffer by virtue of the operation of the project described in the petition;

That the said viewers awarded damages due to wash and erosion on the tract, and which fact is contrary to conditions which would prevail when the said project is in operation;

That the value of a perpetual flowage easement fixed by said commissioners was improperly and erroneously arrived at by them and in a way and manner other than provided for or contemplated by the Flood Control Act of 1928, and the practice and procedure under the condemnation proceedings now pending and in response to which the appointment of these commissioners was authorized. That said commissioners viewed said premises and arrived at their conclusions when the said premises were subjected to the servitude of flood water that had been diverted from the main channel of the Mississippi River, through crevasses and breaches in the river front levee, at places other than the so-called fuse plug area at the northern extremity of the floodway area; that said commissioners improperly considered the servitude imposed upon said premises by flood waters entering said

floodway from sources other than the place contemplated by the said adopted project, as provided for in House Document No. 90, as adopted by the Flood Control Act of 1928, and at a crest in said river and on the Cairo gauge in excess of the present protection afforded by the said river front levees, to-wit:—58½ feet on the Cairo gauge; that the damages considered by them as affecting the value of the flowage easement were arrived at by the improper consideration of flood waters which had been diverted by nature and the force of the river itself, rather than of the reduced levee at the fuse plug section in the northern extremity of the floodway area and over a river side levee in excess of 58½ feet on the Cairo gauge;

That the said commissioners were unduly influenced by the opinion which the Court had heretofore filed in this case, in which the Court indicated its own opinion as to the value of said flowage easement and were thus improperly influenced in arriving at their opinion; that the incorporation into the record of the Court's opinion as to the value of said flowage easement invaded the province and functions of the said commissioners; that the Flood Control Act of 1928 provides that the amount of award, if any, shall be fixed by a Commission of three, subject to the approval of the Court; that the province of the Court is to approve or disapprove the amount of the award, but that the Court is without authority to indicate to said commissioners or in any wise dictate to said commissioners its opinion as to the value of said easement; and that the incorporation in the record of this case of such an opinion by the Court was an invasion of the duties and prerogatives of the said commissioners.

That because of the foregoing assignments together with others not herein stated, the plaintiff asks the Court to vacate, set aside and for naught hold the said findings, as unwarranted in law and not authorized by the facts existing in the premises; and plaintiff asks that it [—] heard in support of these objections, and upon the hearing of same, that this Court will make such order herein as right and justice require.

HARRY C. BLANTON,
U. S. Attorney.

L. JOHN WEBER,
Special Attorney,
Attorneys for Plaintiff.

* Dated this, the 29th day of March, 1937.

Endorsed: Filed March 30, 1937. Jas. J. O'Connor,
Clerk.

160 (Exceptions of William H. Danforth to Report of Viewers as to Tract No. 243.)

(Filed March 20, 1937.)

Comes now William H. Danforth, a resident of St. Louis, Missouri, and objects and excepts to the report of the viewers, Stephen Barton, J. H. King and J. E. Schmucke, which viewers were appointed by the Court under date of November 28, 1936, which report was filed on the 11th day of March, 1937, in the above entitled cause, and in the amount of Seventeen Thousand Nine Hundred Twenty-one Dollars and Seventy Cents (\$17,921.70), and as grounds for his exceptions, states:

1. That the said viewers, and each of them, were without jurisdiction or power to make, render or file an award.

2. That the Court was without jurisdiction or power to appoint the viewers.

3. That the plaintiff and the defendant, William H. Danforth, had reached an accord as to the extent of the damages and had entered into a written contract prior to the appointment of any viewers in this cause; and more particularly prior to the appointment of the said viewers, Stephen Barton, J. H. King and J. E. Schmucke; that in the said contract the said plaintiff and the said defendant, William H. Danforth, had agreed upon a settlement for the damages to the said Tract No. 243 in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-Eight Cents (\$31,-

161 681.98); that the said contract was in the form of an offer made by the plaintiff, through its duly authorized agent, which said offer was dated January 14, 1932; that the said offer was duly extended by plaintiff and was duly accepted by the defendant, William H. Danforth, on March 2, 1932, within the time allowed by the plaintiff for acceptance; that under the terms of the said contract only friendly condemnation proceedings were to be instituted, with a request to the Court for an agreed verdict, and merely for the purpose of clearing title; that the said written offer and written acceptance were in the following words and figures, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building,
Memphis, Tenn.

Jan. 14, 1932.

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100... Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

Incls.—

Tract map;

General map of floodway;

Addressed return envelope.

Accepted:

WM. H. DANFORTH,

(Owner)

c/o Purina Mills,

St. Louis, Mo.

(Address)

March 2, 1932

(Date)."

That the following letter was written by the Government extending the time limit for acceptance to March 15, 1932:

Address Reply to

District Engineer

U. S. Engineer Office

1006 McCall Building

Memphis, Tenn.

War Department

U. S. Engineer Office

1006 McCall Building

Memphis, Tenn.

February 11, 1932.

Refer to File No.

Subject: Tracts 187, 243, 281, 325 and 327—Flowage—New Madrid Floodway.

To: Mr. T. R. Roe,
c/o Ralston Purina Co., Inc.,
835 South Eighth St.,
St. Louis, Missouri.

Dear Sir:

In compliance with your request, dated February 9, 1932, on behalf of Mr. Wm. H. Danforth and for the reasons stated by you, I am glad to extend the time limit for the acceptance of offers made in connection with the above tracts of the New Madrid Floodway to March 15, 1932.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

c.c. to 1st Area."

163 4. Because the award of the said viewers is based upon erroneous principles of law and of valuation of the land in question.

5. Because the said viewers were biased in favor of the Government.

6. Because the report of the viewers shows on its face that the said viewers, and each of them, were prejudiced against the defendant, William H. Danforth, and biased in favor of the Government.

7. Because the award of the viewers is grossly inadequate and is not a fair and just compensation for the easement taken and for the property affected and for the damages caused and to be caused by the flowage rights demanded to be required by the Government over this defendant's said land.

8. Because the said viewers did not, in arriving at the amount of their award, take into consideration and allow com-

pensation for the fact that the flowage would cause damage to the whole tract and would destroy a large part of the same.

9. Because the said viewers gave no opportunity to this defendant to be heard and failed to notify this defendant of any hearing before the said viewers.

10. Because the award of the said viewers is improper in form as well as in substance.

11. Because the said viewers failed to take into consideration, in arriving at their award, proper, legal and just elements of compensation and damage.

12. Because the Court erred in striking from the files on October 15, 1934, the answer and counterclaim of the defendant William H. Danforth as to Tract #243, to which action of the Court in sustaining the said motion to strike the said defendant, William H. Danforth, duly excepted.

13. Because the Court erred in overruling, in part, the motion of the defendant, William H. Danforth, to amend the exceptions, which motion was filed on or about the 12th day of October, 1934.

14. Because the Court erred in overruling on October 18, 1934, the motion of the defendant, William H. Danforth, to vacate the award of the viewers, to set aside the appointment of the viewers, and for judgment in the sum of \$31,681.98, which had been duly agreed upon between plaintiff and the said defendant, William H. Danforth, to which action of the Court the defendant, William H. Danforth, duly excepted.

15. Because the Court erred in overruling on October 21, 1935, the motion of defendant, William H. Danforth, as amended, to vacate the award of the viewers, to set aside the finding of facts, the interlocutory decree, the appointment of viewers and for judgment, to which action of the Court said defendant, William H. Danforth, duly excepted.

16. Because the Court erred in recognizing the right of the viewers to act in either making or filing a report or an award and erred in appointing viewers or in taking any steps other than entering up a judgment in the said sum of
165 Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents. (\$31,681.98), together with interest.

17. Because the Court erred in appointing on or about the 10th day of April, 1936, viewers as to Tract No. 243, the said viewers being Stephen Barton, J. H. King and J. E. Schmucke, and erred in subsequently re-appointing the said viewers as above set out under date of November 28, 1936.

18. Because the Court erred in receiving the report of the said viewers, Stephen Barton, J. H. King and J. E. Schmueke as to Tract No. 243 on or about the 29th day of May, 1936, and also erred in receiving the report of the said viewers under date of March 11, 1937, as above set out.

19. Because the Court erred in failing and refusing to sustain the motion of defendant, William H. Danforth, for judgment, and should have awarded flowage rights to plaintiff, and entered up an award and judgment in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98) as to Tract No. 243.

Wherefore, defendant William H. Danforth prays the Court to sustain his exceptions; to vacate and set aside the award of the said viewers; that the Court either appoint new viewers with instructions from the Court to enter up an award in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98), together with interest from such time as the Court may find that plaintiff appropriated the flowage easement in question, or the right to flood the land in question, which the said defendant contends dates from the passage of the law authorizing the same, or that the Court enter up a judgment in the said sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98), together with interest

166 as aforesaid, in favor of the defendant, William H. Danforth, and against the plaintiff, and upon payment of the same that the Court decree an appropriate judgment in favor of plaintiff for the said easement.

LEAHY, WALTHER, HECKER
& ELY,
and J. L. LONDON,

Attorneys for Defendant,
William H. Danforth.

Copy of the within served on me this the 20th day of Mch.,
1937.

JNO. WEBER,
Atty. for U. S.

J. C. DYOTT,
Counsel

Endorsed: Filed March 20, 1937. Jas. J. O'Connor, Clerk.

167 (Findings and Judgment of District Court Relating to
Tract No. 243.)

(Filed April 23, 1937.)

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
Case No. 716. vs.
Beatrice McDaniel, et al., Defendants.

(Tract No. 243.)

Now on this, the 23rd day of April, 1937, having considered the evidence submitted by both plaintiff and defendants in the above numbered cause as to Tract No. 243, being a portion of the real estate described in said petition, and being fully advised in the premises, and as to all matters pertaining thereto, and upon all the records in the case, the Court doth find and adjudge and decree in the manner following, to-wit:

The Court finds that the United States of America is plaintiff and that the following are defendants:

(see succeeding pages for lists.)

168 Beatrice McDaniel, Poplar Bluff, Missouri;

• • • • •

171 William H. Danforth, St. Louis, Missouri;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

175 The Court doth further find that this proceeding was instituted by the plaintiff in the way and manner as is by statute, in such cases, made and provided; that said petition sets forth a complete cause of action which has for its purpose, the acquirement by proceedings in condemnation of a perpetual easement over, upon and across the lands described in said petition, and which said easement is acquired for the use and benefit of said plaintiff in the establishment of a floodway, as defined and described in said petition, and in furtherance of, and in compliance with, and in conformity to the act of Congress of May 15, 1928, Chapter 569, entitled "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for other purposes", and which is designated and known as the "Flood Control Act".

The Court doth further find that this action was duly authorized and begun as provided by law, and that all proceedings thereunder, including the issuance of all process, writs and notices, are in conformity with the statute in such case made and provided;

And the Court doth further find that all persons named as defendants herein have been lawfully and legally served with

all necessary writs and notices required by law, and in the way and manner by law required and prescribed, and that the Court has jurisdiction of both the subject matter involved in said petition, and of all parties named as defendants;

176. The Court doth further find that the said plaintiff gave due, proper and legal notice to all defendants, of the place where and time when it, the said plaintiff would apply for the appointment of appraisers or viewers of the premises described in said petition, to assess damages and compensation to be paid the said owners thereof for the use and purpose set forth in said petition; and that the said Court did in accordance with said notice, upon the 7th day of February, 1934, appoint three viewers, to-wit: E. P. Deal, R. L. Shelby and E. C. Davis to view said premises, to fix the damages done said property, and to assess the compensation to be paid therefor by the plaintiff;

The Court doth further find that the said viewers before entering upon the discharge of the duties assigned to them by the Court, and the law in such case made and provided, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them, that on the 4th day of May, 1934, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

177. that the amount awarded by said viewers in their report filed on May 4, 1934, as to said Tract No. 243 was \$20,409.90; that exceptions to said viewers' award as to said Tract No. 243 were duly filed both by the plaintiff herein and by the defendant William H. Danforth; that on October 23, 1935, upon due notice to all parties, said cause came on to be heard upon the said exceptions, and that upon the evidence presented by both plaintiff and defendants, the Court did sustain the exceptions of the plaintiff and did overrule the exceptions of the defendant William H. Danforth, and vacate and set aside the said award of viewers as contained in their report filed on May 4, 1934, all as set out in the order of the Court filed and entered on January 28, 1936; that on April 10, 1936, the Court referred the matter of the assessment of damages as to said Tract No. 243 to a new board of viewers,

to-wit, Messrs. Stephen Barton, J. E. Schmuke and J. H. King;

The Court finds that the said viewers before entering upon their duties as such, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 29th day of May, 1936, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form; that the amount awarded by said viewers in their report filed on May 29, 1936, was \$8428.25;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

178. That the defendant William H. Danforth did on the 5th day of August, 1936, and within the time and in the way and manner prescribed by law, duly except to the report of said viewers filed on May 29, 1936, as to the amount assessed therein for damages to said Tract No. 243; that no exceptions to said viewers' report were filed by the plaintiff herein, nor by any other of the defendants, and said persons so failing to file exceptions are hereafter barred from so doing, or voicing any objections to said viewers' report;

The Court further finds that on the 23rd day of October, 1936, upon due notice to all parties, said cause came on to be heard upon the said exceptions of the defendant William H. Danforth, and that upon the evidence presented by both plaintiff and defendant, the Court did sustain the exceptions of the defendant, and did vacate and set aside the said award of viewers as contained in their report filed on May 29, 1936, all as set out in the order of the Court filed and entered on October 24, 1936; that on November 28, 1936, the Court referred the matter of the assessment of damages as to said Tract No. 243 to the same board of viewers, to-wit, Messrs. Stephen Barton, J. E. Schmuke and J. H. King;

The Court finds that the said viewers before entering upon their duties as such, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 11th day of March, 1937, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due

form; that the amount awarded by said viewers in their report filed on March 11, 1937, was \$17,921.70;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

179 That the plaintiff did on the 30th day of March, 1937, and within the time and in the way and manner prescribed by law, duly except to the report of said viewers filed on March 11, 1937, as to the amount assessed therein for damages to said Tract No. 243, and that the said William H. Danforth filed his exceptions to said viewers' report on March 20, 1937; that no exceptions to said viewers' report were filed by any of the other defendants, and said persons so failing to file exceptions are hereafter barred from so doing, or voicing any objections to said viewers' report;

The Court further finds that on the 21st day of April, 1937, upon due notice to all parties, said cause came on to be heard upon the exceptions of plaintiff and defendant William H. Danforth; that all the issues and matters in connection with said Tract No. 243 were submitted to the Court, and that upon evidence submitted by both plaintiff and defendants, the Court did overrule the said exceptions of the plaintiff, and of the defendant William H. Danforth, and did confirm the said viewers' report as to said Tract No. 243; that the plaintiff is entitled to a judgment in condemnation of said land and the defendants herein having any right, title or interest in and to said Tract No. 243 are entitled, in solido, to damages in the sum of \$17,921.70, the said sum being the full amount to which said defendants named in said petition as claiming an interest in and to said tract, and any and all other persons who may be found entitled thereto, are entitled for the purposes for which said action in condemnation was brought, and being the same amount of damages as found by said viewers in their report filed as aforesaid, on March 11, 1937;

The Court finds that the premises described in this petition as Tract No. 243; over which the plaintiff seeks to condemn the said easement and which said premises were viewed by said commissioners or viewers, and which are included in the report thereof, are bounded, defined and described as follows:

180 Tract No. 243, being:

243 Floodway.

Description.

(Heretofore described at marginal page 35 of this printed Record.)

181 The Court doth further find that the easement which plaintiff seeks over and across the above described premises is in completion of the project provided for, and in compliance with, the Act of Congress of May 15, 1928, Chapter 569.

Now Therefore, it is ordered, adjudged and decreed that the said exceptions to the report of the viewers as to said Tract No. 243 should be, and the same are hereby overruled; that the said award of commissioners as to said Tract No. 243 should be, and the same is hereby confirmed and the sum of \$17,921.70 is awarded, in solido, to the defendants named in said petition as claiming an interest in and to said land and to any and all other persons who may be found entitled thereto; that the plaintiff-condemnor, to-wit, the United States of America, by virtue of this proceeding shall have judgment in condemnation against the premises described in said petition, and for the purposes therein defined, and against the defendants therein and each and all of them, jointly and severally as their rights may appear; and that the said plaintiff shall acquire the full, complete and perpetual easement over and across said lands, and the power, right and privilege to cause said lands hereinbefore described to be used for the purpose of a floodway as contemplated by the Act of Congress of May 15, 1928, Chapter 569, and as more fully described in House Document 90 which is made a part of said Act, and that such right shall forever vest in the plaintiff herein, the United States of America; that the said defendants, and each and all, jointly and severally, shall be divested of any and all right, claim, title or interest, of any name, nature or description; that shall in any wise conflict with or interfere with the right of said plaintiff to establish and maintain the aforesaid floodway, and such right shall be vested in the United States of America forever; and

182 It Is Further Ordered that the plaintiff herein shall pay into the registry of this court the sum of \$17,921.70, in solido, which shall be held for the use and benefit of the defendants named in said petition as claiming an interest in and to said Tract No. 243, and any and all other

persons who may be found entitled thereto, in the way and manner and in proportion as this Court shall hereafter order, adjudge and decree; and that upon the payment of the said sum, the plaintiff shall be entitled to the relief prayed for in said petition, and as prayed.

CHARLES B. DAVIS,
United States District Judge.

Dated this, the 23rd day of April, 1937.

Endorsed: Filed Apr. 23, 1937. Jas. J. O'Connor, Clerk.

183 (Record entry of setting aside Award of First and Second Commissions; Exceptions to award of Third Commission overruled.)

(Filed April 23, 1937.)

In the United States District Court for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,
Suit 716 vs. Tract 243.
Beatrice McDaniel, et. al., Defendants.

Tract 243—1033.56 acres.

Award of First Commission, \$20,409.90, heretofore set aside on exceptions of plaintiff as excessive.

Award of Second Commission, \$8,428.25, heretofore set aside on exceptions of defendant, William H. Danforth, as inadequate.

Award of Third Commission, \$17,921.70, to which both plaintiff and defendant, William H. Danforth, have filed and submitted exceptions.

Exceptions of both plaintiff and defendant, William H. Danforth, to the report and award of the Third Commission are overruled.

United States District Judge.

Report of Commissioners approved and confirmed; judgment of condemnation awarded plaintiff as prayed; damages of defendant fixed at the amount set out in Report of Commissioners and judgment entered accordingly in the above case this day.

J.J.O'C.

April 23, 1937

183a (Record entry of filing of Motion of Plaintiff
for New Trial as to Tract No. 243.)

April 27, 1937.

Now on this day comes the United States by the United States Attorney and files motion for a new trial as to tract No. 243 in this cause.

184 Plaintiff's Motion for New Trial as to Tract No. 243.
(Filed April 27, 1937)

Now comes the plaintiff, the United States of America, by its attorneys, in the above entitled cause, as to Tract No. 243, and moves the Court to set aside the order and judgment of the court in the within cause as to said Tract No. 243, rendered, made and entered on April 23, 1937, overruling the exceptions of plaintiff in said cause as to said Tract No. 243, adjudging condemnation for plaintiff and adjudging damages as to said Tract No. 243 in the sum of \$17,921.70, and to grant plaintiff a new trial therein for the following reasons:

(1) That the said order of the court overruling plaintiff's exceptions in the within cause as to said Tract No. 243 is against the evidence and against the weight of the evidence;

(2) The finding and verdict of the court overruling plaintiff's exceptions as to said Tract No. 243 is contrary to law;

(3) The finding and verdict of the court as to said Tract No. 243 was for the wrong party;

(4) The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the defendant as to said Tract No. 243 in the within cause;

(5) The Court erred in rejecting competent, relevant and material evidence offered by the plaintiff as to said Tract No. 243 in the within cause;

185 (6) That the instructions of the court to the commissioners given prior to the return of the instant award filed March 11, 1937, contained the following directions:

You have been appointed commissioners to assess against plaintiff and in favor of defendants, the sum of money which should be awarded to compensate defendants for damages, if any, which will accrue to defendants by reason of the con-

version of the lands of defendants into a potential floodway, and into a temporary floodway, upon the happening of a contingency below mentioned.

"The authority for these proceedings is found in the so-called Flood Control Act of the U. S. Congress, approved May 15, 1928, and more particularly under Section 4 thereof, which provides that the Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way, which, in the opinion of the Secretary of War and Chief of Engineers, are needed to carry out this project. The said proceedings are to be instituted in the U. S. District Court for the district in which the lands, easements or rights of way are located. This same section requires that the United States shall 'provide flowage rights for additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River,' which section is construed as meaning, those additional waters created by floods, which, when the project is completed, would be diverted from the main channel of the Mississippi River, but which would not now, under the present levee structure, pass into the floodway territory.

"This is to say—those floods which would pass over the fuse plug section of the riverside levee at 55 feet on the Cairo gauge, but which would not pass over the present riverside levee as now constructed. The 'Additional destructive flood waters' that will pass by reason of diversion from the main channel of the Mississippi River, is the difference between 55 feet on the Cairo gauge and the protection afforded by the riverside levee as now existing within the so-called fuse plug area. The Government cannot be charged with the responsibility of any damages created by those floods which would pass over the riverside levee as now constructed.

"No land or property of defendants is to be presently taken, touched or damaged by plaintiff, and none will ever be physically taken. Plaintiff is here seeking to subject the lands of defendants to such damage or injury as will accrue to them, when and if, such lands shall be flooded and by reason of flooding them, whenever the height of the flood water in the Mississippi River shall exceed 55 feet on the Cairo, Illinois gauge, subject to consideration of the protection afforded by the old or original levee against flood waters, as herein set forth.

"Whenever the height of the flood water in the Mississippi River shall exceed 55 feet on the said gauge, subject to consideration of the protection afforded by the old 186 or original levee against flood waters, as herein set forth, it is contemplated that a crevasse will occur at some point in the north eleven mile fuse plug section, which begins at the north end of the set back levee and runs south along and with the old or original levee, a distance of eleven miles, and that thereupon land in the floodway will be overflowed by water from the Mississippi River, and consequently damage may occur to all lands within the floodway area."

That the evidence at the instant hearing showed that the commissioners disregarded the Court's instructions by viewing the aforesaid tract of land while covered by flood waters of the character and type defined and described by the Court in said instructions as an inhibited floodwater, and the evidence showed that the said commissioners were influenced thereby and took the January flood of 1937, an inhibited flood, into consideration in arriving at their award, to which plaintiff duly excepted; and that the Court at the hearing of plaintiff's exceptions to the commissioners' award, and over plaintiff's objection and exception duly saved, permitted the introduction of testimony as to the effect on the aforesaid lands of such inhibited flood, and that the Court was influenced thereby in its unfavorable action relative to plaintiff's exceptions herein; that the commissioners erred by going in derogation of the Court's instructions by bringing in an excessive award as alleged in plaintiff's exceptions, and that the Court erred in failing to sustain plaintiff's exceptions when it became apparent to the Court that said commissioners had violated the Court's instructions in bringing in an award based on the effect of a floodwater inhibited under the Court's said instructions to commissioners.

187 (7) The Court erred in admitting testimony tending to prove or establish any action by officers and agents of the United States in artificially crevassing, by dynamite or otherwise, any part of the riverside levee between Bird's Point and New Madrid, Missouri, for the reason that it had been established that the Bird's Point-New Madrid floodway has not yet been completed and that any such action by any Government official, agent or representative, was in violation of Section One of the Flood Control Act of May 15, 1928, was tortious in its effect, and for which the United States

should not and could not be made liable in damages under the aforesaid Flood Control Act;

(8) That the Court erred in failing to hold that the January, 1937 flood was of such type, character and proportion as to be a non-project flood—that is to say, the type, character, time and effects of which were not contemplated by the Flood Control Act of May 15, 1928 as a flood covering which the United States was required under said act to provide flowage easements therefor; that the flood of January, 1937 inundated the territory within the Bird's Point-New Madrid floodway by flood waters thrown in by forces of nature at a crest or elevation in excess of the protection afforded by the riverside levee, and that they were not waters artificially diverted pursuant to the plan under the provisions of the Flood Control Act of May 15, 1928 as excess flood waters from the main channel of the Mississippi River between 55 feet on the Cairo gauge and 57½ feet, the elevation at which the present riverside levee affords protection;

188 The Court erred in filing a memorandum of its findings in the trial on exceptions prior to the instant trial, in which memorandum figures containing the Court's ideas as to values were indicated; and the said memorandum being a court record, became available for inspection by the commissioners in the instant proceeding, they having been furnished a copy of the same from the office of the Clerk of the United States Court, whereas under the law the Court was restricted in said prior proceeding to passing upon the adequacy or inadequacy of the award of the commissioners without making any findings of fact, the same being the sole function of the Court upon a hearing on exceptions; that plaintiff's exceptions in the instant proceeding contained a count setting forth said objection, alleging that the commissioners were unduly influenced by the said expressed opinion of the Court as to values, and the exceptions of plaintiff in the instant proceeding should have been sustained as a matter of law because of the said objection of plaintiff incorporated in its said exceptions to the award filed March 11, 1937, and upon the further showing by the plaintiff at the hearing on the instant exceptions that the commissioners were influenced thereby.

HARRY C. BLANTON,

United States Attorney.

L. JOHN WEBER,
Special Attorney, Department of
Justice.

JOHN C. DYOTT,
Special Attorney, War Dept.
(Attorneys for Plaintiff.)

Dated this, the 27th day of April, 1937.

Endorsed: Filed Apr. 27, 1937, Jas. J. O'Connor, Clerk.

188a (Record Entry of Filing of Motion of William H. Danforth for New Trial as to Tract No. 243.)

July 14, 1937.

Now comes defendant, William H. Danforth, and files motion for new trial as to tract No. 243 in this cause.

189 (Motion of William H. Danforth for New Trial as to Tract No. 243.)

(Filed July 14, 1937.)

Comes now the defendant, William H. Danforth, and moves the Court to set aside the judgment of condemnation awarded plaintiff as prayed, and the judgment entered in favor of defendant and against the plaintiff in the sum of Seventeen Thousand Nine Hundred Twenty-one and 70/100 (\$17,921.70) dollars, and as grounds for said motion states:

(1) That the viewers, and each of them, were without jurisdiction or power to make, render or file an award.

(2) That the Court was without jurisdiction or power to appoint the viewers.

(3) That plaintiff and the defendant, William H. Danforth, had reached an accord as to the extent of the damages and had entered into a written contract prior to the appointment of any viewers in this cause, and more particularly prior to the appointment of the said viewers, Stephen Barton, J. H. King and J. E. Schmucke; that in the said contract the said plaintiff and said defendant, William H. Danforth, had agreed upon a settlement for the damages to the said Tract No. 243 in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,190.681.98); that the said contract was in the form of an offer made by the plaintiff, through its duly authorized agent, which said offer was dated January 14, 1932; that

It said offer was duly extended by plaintiff and was duly accepted by the defendant, William H. Danforth, on March 2, 1932, within the time allowed by the plaintiff for acceptance; that under the terms of the said contract only friendly condemnation proceedings were to be instituted, with a request to the Court for an agreed verdict, and merely for the purpose of clearing title; that the said written offer and written acceptance were in the following words and figures, to-wit:

“War Department
U. S. Engineer Office
1006 McCall Building,
Memphis, Tenn.

Jan. 14, 1932.

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

191 4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and

return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

Incs.

Tract map;
General Map of floodway;
Addressed return envelope.

Accepted:

WM. H. DANFORTH,
(Owner)
c/o Purina Mills
St. Louis, Mo.
(Address)
March 2, 1932
(Date)."

1. That the following letter was written by the Government extending the time limit for acceptance to March 15, 1932:

Address Reply to	"War Department
District Engineer	U. S. Engineer Office
U. S. Engineer Office	1006 McCall Building
1006 McCall Building,	Memphis, Tenn.
Memphis, Tenn.	

February 11, 1932.

Refer to File No.

Subject: Tracts 187, 243, 281, 325 and 327—
[Plowage]—New Madrid Floodway.

To: Mr. T. R. Roe,
c/o Ralston Purina Co., Inc.,
835 South Eighth St.,
St. Louis, Missouri.

Dear Sir:

In compliance with your request, dated February 9, 1932, on behalf of Mr. Wm. H. Danforth and for the reasons stated by you, I am glad to extend the time limit for the acceptance of offers made in connection with the above tracts of the New Madrid Floodway to March 15, 1932.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers, Dis-
trict Engineer.

cc. to 1st Area."

192 (4) Because the award of the said viewers is based upon erroneous principles of law and of valuation of the land in question.

(5) Because the said viewers were biased in favor of the Government.

(6) Because the report of the viewers shows on its face that the said viewers, and each of them, were prejudiced against the defendant, William H. Danforth, and biased in favor of the Government.

(7) Because the award of the viewers is grossly inadequate and is not a fair and just compensation for the easement taken and for the property affected and for the damages caused and to be caused by the flowage rights demanded to be required by the Government over this defendant's said land.

(8) Because the said viewers did not, in arriving at the amount of their award, take into consideration and allow compensation for the fact that the flowage would cause damage to the whole tract and would destroy a large part of the same.

(9) Because the said viewers gave no opportunity to this defendant to be heard and failed to notify this defendant of any hearing before the said viewers.

(10) Because the award of the said viewers is improper in form as well as in substance.

(11) Because the said viewers failed to take into consideration, in arriving at their award, proper, legal and just elements of compensation and damage.

(12) Because the Court erred in striking from the files on October 15, 1934, the answer and counterclaim of the defendant William H. Danforth as to Tract No. 243, to which action of the Court in sustaining the said motion to
193 strike the said defendant, William H. Danforth, duly excepted.

(13) Because the Court erred in overruling, in part, the motion of the defendant, William H. Danforth, to amend the exceptions, which motion was filed on or about the 12th day of October, 1934.

(14) Because the Court erred in overruling on October 18, 1934, the motion of the defendant, William H. Danforth, to vacate the award of the viewers, to set aside the appointment of the viewers, and for judgment in the sum of \$31,-

681.98, which had been duly agreed upon between plaintiff and the said defendant, William H. Danforth, to which action of the Court the defendant, William H. Danforth, duly excepted.

(15) Because the Court erred in overruling on October 21, 1935, the motion of defendant, William H. Danforth, as amended, to vacate the award of the viewers, to set aside the finding of facts, the interlocutory decree, the appointment of viewers and for judgment, to which action of the Court said defendant, William H. Danforth, duly excepted.

(16) Because the Court erred in recognizing the right of the viewers to act in either making or filing a report or an award and erred in appointing viewers or in taking any steps other than entering up a judgment in the said sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98); together with interest.

(17) Because the Court erred in appointing on or about the 10th day of April, 1936, viewers as to Tract No. 243, the said viewers being Stephen Barton, J. H. King and J. E. Schmucke, and erred in subsequently re-appointing the said viewers as above set out under date of November 28, 1936.

(18) Because the Court erred in receiving the report of the said viewers, Stephen Barton, J. H. King and J. E. Schmucke as to Tract No. 243 on or about the 29th day of May, 1936, and also erred in receiving the report of the said viewers under date of March 11, 1937, as above set out.

(19) Because the Court erred in failing and refusing to sustain the motion of defendant, William H. Danforth, for judgment, and should have awarded flowage rights to plaintiff, and entered up an award and judgment in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98) and interest as to Tract No. 243.

(20) That the said award and judgment are contrary to the law, the evidence, and the evidence under the law.

(21) That the said award is against the weight of the evidence.

(22) That the Court erred in permitting plaintiff to introduce incompetent, irrelevant and immaterial testimony, to which the defendant duly excepted.

(23) That the Court erred in refusing to permit the defendant to offer competent, relevant and material testimony, to which the defendant duly excepted.

(24) That the Court erred in overruling the defendant's exceptions to the award of the viewers.

LEAHY, WALTHER, HECKER & ELY,
and J. L. LONDON,
Attorneys for Defendant William H. Danforth.

Endorsed: Filed July 14, 1937. Jas. J. O'Connor, Clerk.

195 Disclaimer of Northwestern Mutual Life Insurance Company, a corp., and Petition for Dismissal of Proceedings as to said corporation and Wilbur E. Hoag, parties defendant.

(Filed October 19, 1937.)

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
Case No. 716. vs. (As to Tract No. 243)
Beatrice McDaniel, et al., Defendants.

Comes now Northwestern Mutual Life Insurance Company, a corporation, one of the defendants named in the above entitled Case No. 716, as to Tract No. 243, as a party defendant, it being alleged in the petition of the plaintiff, and indicated in the judgment rendered in this cause as to Tract No. 243, that the said Northwestern Mutual Life Insurance Company, a corporation, was cestui que trust in four certain deeds of trust, as follows; to-wit:

A certain deed of trust dated May 28, 1920, filed June 8, 1920, and recorded in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

A deed of trust dated June 1, 1920, filed June 18, 1920 and recorded in book 60 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

A deed of trust dated June 14, 1920, filed June 24, 1920, recorded in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

A deed of trust dated June 14, 1920, filed June 22, 1920, recorded in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

That prior to the rendition of said judgment in condemnation as aforesaid, releases of deeds of trust were made, executed and filed in the office of the recorder of deeds of Mississippi County, Missouri, as follows, to-wit:

As to the deed of trust aforesaid, recorded in book 69 at page 118, a release of deed of trust with presentation of notes secured thereby as required by law, said release being dated June 11, 1935, filed July 3, 1935, and duly recorded in book 118 at page 147 of the records of Mississippi County, Missouri, the same being a release in full of the obligation secured by said deed of trust recorded in said book 69 at page 118 of the records of Mississippi County, Missouri;

196 As to the deed of trust aforesaid, recorded in book 69 at page 124, a release of deed of trust with presentation of notes secured thereby as required by law, said release being dated June 11, 1935, filed July 3, 1935, and duly recorded in book 118 at page 146 of the records of Mississippi County, Missouri, the same being a release in full of the obligation secured by said deed of trust recorded in said book 69 at page 124 of the records of Mississippi County, Missouri;

As to the deed of trust aforesaid, recorded in book 69 at page 128, a release of deed of trust with presentation of notes secured thereby as required by law, said release being dated April 27, 1935, filed May 1, 1935, and duly recorded in book 118 at page 56 of the records of Mississippi County, Missouri, the same being a release in full of the obligation secured by said deed of trust recorded in said book 69 at page 128 of the records of Mississippi County, Missouri;

As to deed of trust aforesaid, recorded in book 69 at page 126, a release of deed of trust with presentation of notes secured thereby as required by law, said release being dated June 11, 1935, filed July 3, 1935, and duly recorded in book 118 at page 145 of the records of Mississippi County, Missouri, the same being a release in full of the obligation secured by said deed of trust recorded in said book 69 at page 126 of the records of Mississippi County, Missouri;

That at the time of release of said respective deeds of trust as aforesaid, your petitioner, Northwestern Mutual Life Insurance Company, a corporation, was the sole owner and legal holder of said respective deeds of trust and the notes secured thereby, and that subsequently thereto your petitioner had no further interest whatsoever in the aforesaid condemnation proceeding or in said Tract No. 243 described in Case No. 716 or in the proceeds of any judgment that might be

rendered or that has since been rendered as aforesaid, as to said Tract No. 243;

That your petitioner has been named in said judgment rendered as to said Tract No. 243 and entered on April 23, 1937 in said Case No. 716 in this court, together with Wilbur E. Hoag, the said Wilbur E. Hoag being named as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in each of the four respective deeds of trust specifically above described and heretofore released by your petitioner on the dates aforesaid; and that because of the aforesaid releases in full made, executed, filed and recorded respectively, as indicated, and covering the four respective deeds of trust described aforesaid in which your petitioner was named as a party defendant as to Tract No. 243 in Case No. 716 in this court, your petitioner, Northwestern Mutual Life Insurance Company, a corporation had no right, title or interest whatsoever in and to said Tract No. 243 on April 23, 1937, the date of rendition of the judgment aforesaid, and no right, title or interest whatsoever in and to the proceeds of judgment for damages in solido, which formed a part of the aforesaid judgment in condemnation rendered on April 23, 1937;

And that because of the premises your petitioner, Northwestern Mutual Life Insurance Company, a corporation, disclaims any and all right, title and interest whatsoever in and to the proceeds of judgment rendered on April 23, 1937 in the sum of \$17,921.70, in solido, and states that said condemnation proceedings should be dismissed as to said Northwestern Mutual Life Insurance Company, a corporation, and as to said Wilbur E. Hoag, trustee for Northwestern Mutual Life Insurance Company, a corporation, in the aforesaid four described released deeds of trust;

Wherefore, your petitioner, the Northwestern Mutual Life Insurance Company, a corporation, prays that the said Cause No. 716, as to Tract No. 243 may be dismissed as to said petitioner, Northwestern Mutual Life Insurance Company, a corporation, and as to Wilbur E. Hoag, trustee for your petitioner, in the aforesaid described deeds of trust which have been heretofore released as indicated in the premises.

**NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY, a corporation,**

By H. D. Thomas, Vice-President.

Dated this, the 12th day of October, 1937.

Filed Oct. 19, 1937. Jas. J. O'Connor, Clerk.

198 (Order Overruling Motions of Plaintiff and William H. Danforth for New Trial.)

November 30, 1937.

Now comes the United States by the United States Attorney and Defendant Danforth by his Attorney and the motions, heretofore filed, of plaintiff and defendant Danforth for a new trial as to tract No. 243 are now taken up for hearing and submitted to the Court and by the Court overruled. Exceptions allowed both plaintiff and defendant Danforth.

199 Petition for Appeal

(Filed February 26, 1938)

In the District Court of the United States for the
Southeastern Division of the Eastern
Judicial District of Missouri

United States of America, Plaintiff,
No. 716 vs. Tract #243.
Beatrice McDaniel, et al., Defendants.

Comes now William H. Danforth, one of the defendants in the above entitled cause, and conceiving himself aggrieved by the final judgment herein, which was made and took effect on to-wit: November 29, 1937, hereby appeals from said judgment and all orders and proceedings had in said cause, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in his Assignment of Errors filed herewith; and he prays that this appeal may be allowed, and a transcript of the record, proceedings, and papers, upon which the judgment herein was made and based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

And your petitioner further prays that the proper order relating to security for costs required for him be made and entered herein.

WM. H. DANFORTH,
Defendant.

J. L. LONDON
Attorney for Defendant.

Leahy, Walther, Hecker & Ely William H. Danforth.
Of Counsel.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

200

Assignment of Errors
(Filed February 26, 1938)

Now comes William H. Danforth, one of the defendants in the above entitled cause, and assigns the following errors, which the said defendant avers were committed in connection with the trial of the above entitled cause, to the prejudice of the said defendant, and upon which the defendant will rely in the prosecution of the appeal in the above entitled cause:

1. The Court erred in failing and refusing to sustain the motion of William H. Danforth, on April 22, 1937 and on April 23, 1937, to enter judgment for \$31,681.98 in favor of defendants.

2. The Court erred in failing and refusing to enter up a judgment for an easement to flowage rights in favor of plaintiff and a judgment in the sum of \$31,681.98 and interest in favor of the said defendant.

3. The Court erred, on October 21, 1935, in overruling the motion of defendant, William H. Danforth, as amended, to vacate the award of the viewers to set aside the findings of fact, the interlocutory decree, the appointment of viewers, and for judgment in the sum of \$31,681.98, and interest, to which action of the Court the said defendant, William H. Danforth, duly excepted.

4. The Court erred, on October 18, 1934, in overruling the motion of defendant, William H. Danforth, to vacate the award of the viewers, to set aside the appointment of the viewers, and for judgment in the sum of \$31,681.98, which sum had been duly agreed upon by plaintiff and defendant, William H. Danforth, to which action of the Court the defendant, William H. Danforth, duly excepted.

5. The Court erred in overruling, in part, the motion of defendant, William H. Danforth, to amend the exceptions, which motion was filed on or about the 12th day of October, 1934, which ruling, filed October 12, 1934, reads as follows:

Memorandum

October 12, 1934

United States of America, Plaintiff.
Case No. 716 vs. Tract No. 243
Beatrice McDaniel, et al., Defendants.

Motion of defendant Danforth to amend exceptions filed.
Parties appear through their counsel. Motion argued and.

submitted. That part of motion on page one, beginning with line 6 of body of motion reading as follows:

"That the said commissioners were without jurisdiction or power to render an award; and for the further reason that the plaintiff and the defendant William H. Danforth reached an accord as to the damages and had made a written contract prior to the appointment of the said Commissioners and prior to the filing of the said award, to-wit: on the 2nd day of March, 1932, under the terms of which contract the said plaintiff and the said defendant William H. Danforth, as owner of Tract No. 243 had agreed in writing upon settlement for damages to Tract No. 243 in the sum of \$31,681.98, through a letter written by the plaintiff, through its duly authorized agent, dated January 14, 1932; that the said offer was duly accepted by the defendant William H. Danforth on March 2, 1932, under the terms of which contract only friendly condemnation proceedings were to be instituted, with the request for an agreed verdict, and for the purpose of clearing title; that the said offer and acceptance were in the following language, to-wit:

Subject: War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

202 To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred [eightt-one] and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as this title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

Incls.—

BREHON SOMERVELL

Tract map: Major, Corps of Engineers,
General Map of floodway; District Engineer.
Addressed return envelope

Accepted:

WM. H. DANFORTH

(Owner)

c/o Purina Mills

St. Louis, Mo.

(Address)

March 2, 1932

(Date)."

That the said sum of \$31,681.98 should be paid into the Court by plaintiff under the law and under the said contract of settlement. That in accordance with the terms of the said written contract the said defendant herewith tenders into Court title to the said easement as prayed in plaintiff's petition, conditioned upon payment by plaintiff into Court of the said sum of \$31,681.98 for the benefit of the defendants as their interest may appear in the said cause.

203 That part of motion above set out is overruled on the ground that the matter pleaded in said motion has no place in the exceptions to award. Said defendant Danforth excepts to the ruling of the Court in refusing to permit the said amendment.

That part of the motion beginning on bottom of page two, beginning at line four from bottom thereof, and on page 3, reading as follows:

That the award of the commissioners is based upon speculation.

Said defendant also desires to amend the prayer by striking the following part of the prayer:

and that new commissioners be appointed in accordance with the law."

and substituting therefor after the word 'aside,' in the second line of the prayer the following:

and that either new commissioners be appointed with instructions from the Court to enter up an award in the said sum of \$31,681.98, to be affirmed by the Court, or that the Court enter up judgment in the sum of \$31,681.98 in favor of the defendants and against the plaintiff, and that the Court enter a decree in favor of plaintiff and against the defendants for the perpetual easement prayed in plaintiff's petition,

sustained, and said amendments may be made as requested, to each of which said amendments the plaintiff separately excepts.

L. JOHN WEBER,

Special Assistant to the
United States Attorney
Attorney for the Plaintiff.

Dated October 12, 1934"

204 6. The Court erred in appointing viewers and in recognizing the right of the viewers to act in either making or filing a report or an award or in taking any steps other than entering up a judgment in the said sum of \$31,681.98, together with interest.

7. The Court erred in appointing on or about the 10th day of April, 1936, viewers as to the said Tract #243, the said viewers being Stephen Barton, J. H. King, and J. E. Schmucke, and erred in subsequently re-appointing said viewers as above set out, on November 28, 1936.

8. The Court erred in receiving the report of the said Viewers Stephen Barton, J. H. King, and J. E. Schmucke as to Tract #243, on or about the 29th day of May, 1936, and also erred in receiving the report of the said viewers under date of March 11, 1937, as above set out.

9. The Court erred in overruling the defendant's exceptions to the award of the viewers.

10. The Court erred in striking from the files, on October 15, 1934, the answer and counterclaim of the defendant, William H. Danforth, as to Tract #243, to which action of the Court the said defendant, William H. Danforth duly excepted.

11. The Court erred in failing and refusing to enter up a judgment for the easement in favor of the plaintiff and in the sum of \$31,681.98 in favor of said defendant, William H. Danforth, after the contract entered into between the plaintiff and this defendant was pleaded and offered in evidence, which said contract consisted of correspondence, and under which correspondence the plaintiff and the defendant, William H. Danforth, had reached an accord as to the extent of the damages and had entered into the said written contract by correspondence prior to the appointment of any viewers in the cause, and more particularly prior to the appointment of the said viewers, Stephen Barton, J. H. King, and J. E. Schmucke; that in the said contract the said plaintiff and said defendant, William H. Danforth, had agreed upon a settlement for damages by reason of the flowage easement as to Tract No. 243 in the sum of \$31,681.98; that the said contract was in the form of an offer made by the plaintiff, through its duly authorized agent, which offer was dated January 14, 1932; that the said offer, upon request of the said defendant, William H. Danforth, was duly extended by plaintiff, and was duly accepted by the defendant, William H. Danforth, on March 2, 1932, within the time allowed by plaintiff for acceptance; that under the terms of the said contract only friendly condemnation proceedings were to be instituted, with a request to the Court for an agreed verdict, and merely for the purpose of clearing title; that the said written offer and acceptance were in the following words and figures, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid
Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of

Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer.

206 Payment cannot be made without Court action as this title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

Incs.

Traet map:

General Map of floodway:

Addressed return envelope

Accepted:

WM. H. DANFORTH,
(Owner)

c/o Purina Mills,

St. Louis, Mo.

(Address)

March 2, 1932.

(Date)."

The following letter was written by the Government extending to the time limit for acceptance to March 15, 1932:

Address Reply to

District Engineer

U. S. Engineer Office,

1006 McCall Building,

Memphis, Tenn.

War Department

U. S. Engineer Office

1006 McCall Building,

Memphis, Tenn.

February 11, 1932.

Refer to File No.

Subject: Tracts 187, 243, 281, 325 and 327—
Flowage—New Madrid Floodway.

To: Mr. T. R. Roe,
c/o Ralston Purina Co., Inc.,
835 South Eighth St.,
St. Louis, Missouri.

Dear Sir:

In compliance with your request, dated February 9, 1932, on behalf of Mr. Wm. H. Danforth and for the reasons stated by you, I am glad to extend the time limit for the acceptance of offers made in connection with the above tracts of the New Madrid Floodway to March 15, 1932.

Very truly yours,

(Signed) BREHON SOMERVELL,

Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

cc. to 1st area."

207 12. Because the said viewers and each of them were without jurisdiction or power to make, render, or file an award.

13. Because the Court was without jurisdiction and power to appoint the viewers under the undisputed facts as shown by the pleadings and the evidence.

14. Because the Court erred during the trials of the cause in overruling the motion for judgment, which was renewed at each hearing of the cause, and was kept alive throughout all of the proceedings, the said defendant always taking the position that he was entitled to judgment in the sum of \$31,681.98, and the Court throughout the trials and hearings refusing to enter judgment, in accordance with the various motions made by said defendant for said judgment in said amount.

16. The Court erred at the trial on October 23, 24, and 25, 1935, in refusing to allow the defendant to introduce depositions taken in Washington, D. C. of General Edward M. Martin and of Patrick J. Hurley, the Court saying:

"Well, it is my judgment, Mr. London that this is not competent evidence in the case. The government is not to be bound by the admission of its officers and their acts. You may make your record and save your point in any way you can and you may make an offer of proof covering these mat-

ters. But, the Court will sustain the objection to the offer of this deposition.

Mr. London: Very well Your Honor. I assume Your Honor intends that to apply also to the testimony of the Secretary of War, Patrick J. Hurley, whose deposition I want to offer in the same way, and Major Brehon Somervell, whose deposition I want to offer. They are all together.

Mr. Dyott: The same thing Your Honor.

The Court: Sustain the objection.

To which action and ruling of the Court the defendant by counsel then and there duly excepted at the time and still excepts.

Mr. London: May I make an offer of proof, Your Honor!

The Court: Yes, sir."

208 The depositions of Patrick J. Hurley, Secretary of War, and Major-General Edward M. Martin, were then offered, and upon objection were refused by the Court, exceptions being saved.

Because of the aforesaid errors the defendant prays that the Court below be instructed by this Court to enter judgment in the sum of \$31,681.98, together with interest.

J. L. LONDON,
Attorney for Defendant,
William H. Danforth.

Leahy, Walther, Hecker & Ely,
Of Counsel.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

209

Order Allowing Appeal.

(Filed February 26, 1938.)

Now comes defendant, William H. Danforth, and files his Assignment of Errors, Petition for Appeal, Citation, and his Appeal Bond in the sum of Two Hundred Fifty Dollars (\$250.00).

It is thereupon ordered that said defendant be and is hereby allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit; that said appeal bond be and the same is hereby approved, and that said defendant, William H. Danforth, be and is hereby allowed until April 7,

1938, in which to file his transcript on appeal in the United States Circuit Court of Appeals for the Eighth Circuit, and that the Clerk certify a transcript to said United States Circuit Court for the Eighth Circuit as required by the statutes and rules.

Done at St. Louis, Missouri, this 26th day of February, 1938. o

CHARLES B. DAVIS,
United States District Judge.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

210 . Bond On Appeal.

(Filed February 26, 1938.)

Know All Men By These Presents, That we, William H. Danforth, as principal, and Massachusetts Bonding & Insurance Company, a corporation, as surety, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said United States of America, its heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 25th day of February, in the year of our Lord one thousand nine hundred and thirty-eight.

Whereas, lately at the April Term, A. D. 1937, of the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri, in suit pending in said Court, between United States of America, Plaintiff, and Beatrice McDaniel, et al., Defendants, being cause #716, Tract #243, judgment was rendered against the said plaintiff, United States of America, in the sum of \$17,921.50, which said judgment became final on the 29th day of November, 1937, at the October Term, 1937, of the said Court, upon the overruling of the motions for new trial filed by defendant, William H. Danforth, and by plaintiff, 211 during the said term, and on the said 29th day of November, 1937, and the said William H. Danforth has obtained leave of said Court to reverse the said judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing said United States of America to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, forty days from and after the date of said Citation.

Now the Condition of the Above Obligation is Such, That if the said William H. Danforth shall prosecute said appeal to effect, and answer all damages and costs if he fail to make good his appeal, then the above obligation to be void, else to remain in full force and virtue:

Sealed and delivered in presence of—

WILLIAM H. DANFORTH,

Principal,

MASSACHUSETTS BONDING &
INSURANCE COMPANY,

By John L. Patterson, Attorney-in-Fact.
Surety.

Approved by

CHARLES B. DAVIS,
United States District Judge.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

212 (Order February 26, 1938, Extending Time to File Bill of Exceptions, Etc.)

(Filed February 26, 1938.)

Now on this day comes the defendant, William H. Danforth, by attorney, and on his application said defendant, William H. Danforth, is granted 30 days from this date within which to file Bill of Exceptions. The term is extended as to this case for Ninety Days from this date.

Dated this 26th day of February, 1938.

CHARLES B. DAVIS,
United States District Judge.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

213 (Order, March 15, 1938, Extending Time For William H. Danforth to File Praecept for Transcript.)

Entered March 15, 1938.

Now on this day is filed order granting defendant, William H. Danforth, 15 days additional in which to file praecipe.

- 214 (Order, March 22, 1938, Further Extending Time For William H. Danforth to File Praeipé For Transcript.)

Entered March 22, 1938.

Now on this day is filed order granting defendant, William H. Danforth, 15 days additional in which to file praecipe.

- 215 (Order, March 22, 1938, Further Extending Time to File Bill of Exceptions and Extending Time to File Transcript.)

(Filed March 22, 1938.)

On application of defendant, William H. Danforth, and for cause shown, the said defendant is hereby granted up to and including April 27, 1938, within which to file his bill of exceptions, and is also granted up to and including May 7th in which to file his transcript, in the above entitled matter.

CHARLES B. DAVIS,

Judge.

Endorsed: Filed March 22, 1938. Jas. J. O'Connor, Clerk.

- 216 (Order, March 30, 1938, Further Extending Time For William H. Dnaforth to File Praeipé For Transcript.)

(Filed March 30, 1938.)

Upon application of defendant, William H. Danforth, for additional time within which to file praecipe, said defendant William H. Danforth, is herewith granted fifteen (15) days additional from and after March 30, 1938, within which to file praecipe in the above entitled matter.

CHARLES B. DAVIS,

Judge.

Endorsed: Filed March 30, 1938. Jas. J. O'Connor, Clerk.

- 217 (Stipulation that Motions for New Trial may be considered as part of Bill of Exceptions, etc.)

(Filed April 16, 1938.)

It is hereby stipulated by and between the parties to the above entitled cause, through their respective counsel, that the motions for new trial filed by the plaintiff and defendant need not be rewritten here but may be considered as part of

this bill of exceptions by reference to the motions for new trial of both plaintiff and defendant, which are called for by the praecipe and are set out in the record.

JOHN WEBER, Special Attorney De-
partment of Justice,

Attorney for Plaintiff.

LEAHY, WALTHER, HECKER &
ELY & J. L. LONDON,

Attorneys for Defendant,
William H. Danforth.

Endorsed: Filed Apr 16, 1938. Jas. J. O'Connor, Clerk.

218 (Stipulation that Plaintiff May Have Additional Time
For Filing Counter-Praecipe For Transcript.)
(Filed April 18, 1938.)

It is hereby stipulated by and between the parties to the above entitled cause, to-wit, the United States of America, Plaintiff, and William H. Danforth, Defendant, through their respective counsel, that the Plaintiff, the United States of America, may have, and that the Court may order that said Plaintiff may have ten days additional time from and after April 19, 1938, within which to file its counter-praecipe in the above entitled matter.

L. JOHN WEBER, Special Attorney
Department of Justice,

Attorney for Plaintiff.

LEAHY, WALTHER, HECKER &
ELY & J. L. LONDON,

Attorneys for Defendant,
William H. Danforth.

Endorsed: Filed Apr. 18, 1938. Jas. J. O'Connor, Clerk.

219 (Stipulation For Further Extension of Time For Fil-
ing Bill of Exceptions and Transcript, etc.)
(Filed April 23, 1938.)

Whereas, the Department of Justice at Washington, D. C., desires to have an opportunity of looking over the bill of exceptions in the above entitled cause, And,

Whereas, plaintiff deems it necessary to forward a copy of the same, together with other documents called for by the praecipe, which has been filed by the defendant in this cause, to the Department of Justice at Washington, D. C.,

Now, Therefore, in consideration of the premises and for the reasons set out above, It Is Hereby Stipulated and Agreed by and between the parties, through their respective counsel, that the time for the filing of the bill of exceptions and for the filing of the transcript on appeal may be extended up to and including May 24, 1938, And It Is Further Agreed that this may constitute a joint request to the Court to extend the time for the filing of the said bill of exceptions and for the filing of the transcript on appeal.

April 22, 1938.

JOHN C. DYOTT,

Atty. For Plaintiff,

L. JOHN WEBER,

Special Atty. Dept. of Justice.

Attorneys for Plaintiff.

LEAHY, WALTHER, HECKER &

ELY & J. L. LONDON,

Attorneys for Defendant,

William Danforth.

Endorsed: Filed Apr. 23, 1938. Jas. J. O'Connor, Clerk.

220 (Stipulation As To Time For Filing Objections to
Bill of Exceptions by Plaintiff.)

(Filed April 23, 1938.)

It is hereby stipulated and agreed, by and between the above parties, through their respective counsel, that the plaintiff, the United States of America, may have up to and including May 21, 1938, in which to file its objections to the bill of exceptions heretofore lodged with the Clerk of the United States District Court at Cape Girardeau, Missouri.

April 22, 1938.

JOHN C. DYOTT,

Attorney for U. S. Engineers' Office, Memphis.

L. JOHN WEBER,

Special Atty. Dept. of Justice.

Attorneys for Plaintiff.

LEAHY, WALTHER, HECKER &

ELY & J. L. LONDON,

Attorneys for Defendant,

William H. Danforth.

Endorsed: Filed Apr. 23, 1938. Jas. J. O'Connor, Clerk.

- 221 (Order, April 23, 1938, Extending Time for Plaintiff to File Objections to Bill of Exceptions and Further Extending Time to File Bill of Exceptions and Transcript.)

(Filed April 23, 1938.)

For good cause shown, and pursuant to stipulation between the parties, plaintiff is granted up to and including May 21, 1938, in which to file objections to the bill of exceptions heretofore lodged in Court, and defendant, William H. Danforth, is granted up to and including May 24, 1938, in which to file the bill of exceptions, and in which to file the transcript on appeal.

CHARLES B. DAVIS,

Judge.

4-22-1938.

Endorsed: Filed Apr. 23, 1938. Jas. J. O'Connor, Clerk.

- 222 (Order, May 23, 1938, Further Extending Time to File Bill of Exceptions and Transcript, etc.)

(Filed May 23, 1938.)

For good cause shown, the Term of Court in the above styled case heretofore extended on February 26, 1938, for a period of ninety (90) days, is further extended for an additional period of ninety (90) days from and after May 27, 1938, to August 25, 1938.

The defendant, William H. Danforth, is granted sixty (60) days additional up to and including July 25, 1938, in which to file both the bill of exceptions and the transcript on appeal.

Plaintiff, United States of America, is granted up to and including June 1, 1938, in which to file objections or proposed amendments to the bill of exceptions.

CHARLES B. DAVIS,

Judge.

Dated: May 21, 1938.

Endorsed: Filed May 23, 1938. Jas. J. O'Connor, Clerk.

- 223 (Stipulation For Further Extension of Time to File Bill of Exceptions and Transcript.)

(Filed May 23, 1938.)

It is hereby stipulated by and between the parties, through their respective counsel, that the terms of the above entitled

cause may be extended for an additional ninety (90) days from and after the expiration of the present term of the said cause, on to-wit: May 27, 1938, to and including August 25, 1938; that the defendant, William H. Danforth, may have sixty (60) days additional from and after the 24th day of May, 1938, in which to file the bill of exceptions, and also the transcript on appeal.

It is also agreed and stipulated by and between the parties that the plaintiff, the United States of America, may have up to and including June 1, 1938, in which to file any objections or proposed amendments to the bill of exceptions.

L. JOHN WEBER,

Special Atty. Dept. of Justice,

JOHN C. DYOTT,

Atty. U. S. Engineers' Office.
Attorneys for Plaintiff.

LEAHY, WALTHER, HECKER &

ELY & J. L. LONDON,

Attorneys for Defendant,
William H. Danforth.

Endorsed: Filed May 23, 1938. Jas. J. O'Connor, Clerk.

224 (Record Entry of Filing of Bill of Exceptions.)

Entered June 1, 1938.

Bill of Exceptions of defendant, Wm. H. Danforth as to tract No. 243, settled, signed, sealed, filed and made a part of the record in this cause.

225 Transcript of Evidence and Proceedings

(Filed June 1, 1938)

In the District Court of the United States Within and For
the Southeastern Division of the Eastern Judicial
District of Missouri

United States of America, Plaintiff,

Cause No. 716

vs.

Tract No. 243.

Beatrice McDaniel, et al., Defendants.

Be It Remembered, That the above styled cause came on for hearing and was heard in the District Court of the United States, within and for the Southeastern Division of the Eastern Judicial District of Missouri, at Cape Girardeau, Missouri, before the Honorable Charles B. Davis,

Judge, on the 21st and 22nd days of April, A. D. 1937, and the following proceedings were had:-

Appearances

John C. Dyott, Esq.,

Special Assistant to the United States Attorney, and

L. John Weber, Esq.,

Special Assistant to the United States Attorney,

For Plaintiff;

J. L. London, Esq.,

For Defendant,

W. H. Danforth.

Mr. Dyott: We are ready now, Your Honor, in the other case: There are joint exceptions, Your Honor, to the last report of the viewers; an exception by Mr. London and exception by the Government.

Mr. London: But on different grounds, Your Honor.

Mr. London: If Your Honor please, before any testimony is offered in this case for the purpose of a record, I would like to renew my Motion for Judgment in this case as heretofore made, and I assume the Court's ruling will be the same.

The Court: Overrule the Motion.

Mr. London: Note my exception.

226 It is agreed between the parties that inasmuch as certain portions of the petition and other papers and testimony hereinafter listed, are not relevant nor pertinent to any issue on appeal, that same are omitted from the precept and Transcript of the Record, to-wit:

1. Motion for leave to file petition, together with order granting same.

2. Caption and portions of petition that have no reference to Tract #243.

3. Order of publication.

4. Summons and Marshal's return. (No question has been raised about question of service or of notice of the report of the commissioners.)

5. Testimony of a number of witnesses regarding values and damages.

Mr. Dyott: The Government desires to offer the entire hearing of the last time, in October, 1936, the testimony

that the Government submitted at that time, together with the Exhibits and the Reports of the Commissioners.

Mr. London: Together with the Exhibits?

Mr. Dyott: Sure.

Mr. London: Let me understand this. Are you also offering testimony in connection with the testimony I took in Washington?

Mr. Dyott: I am including that because that was included by the Court.

Mr. London: I want to be sure about that. I renew my Motion for Judgment.

The Court: At this time the Court desires to overrule your Motion for Judgment.

Mr. London: May I save an exception, please?

227 To which action and ruling of the Court in overruling Defendant's Motion for Judgment, the defendant, by counsel, then and there duly excepted at the time and still continues to except.

In order to make known to the Court the nature of the Floodway Project, and its effect upon the Floodway Area, a brief resume of the engineering testimony offered at the trial is herewith given.

T. T. KNAPPEN, senior engineer for the Government, Memphis Engineer District, testified from a general map, showing part of southeast Missouri, Illinois, and Kentucky, in which the floodway is located, and which surrounds the floodway. He pointed out the upper Mississippi River, coming down, indicated Commerce on the map, where the hills end and the alluvial valley begins, and follows down the Mississippi River. Then he pointed out Cairo, where the Ohio River joins the Mississippi. The two combined flow from Cairo South. Then he pointed out New Madrid, located 70 miles from Cairo, or by air-line about 35 miles. Then he pointed out Charleston, located some 20 miles from Cairo. He then designated on the map the front line levee. This was the river bank levee, which starts at the hills at Commerce, and follows on down close to the bank of the river, continuing on down and close to, but on this side of New Madrid. He pointed out the levees around Cairo and the Cairo Drainage District, and from there down there were bluffs close to the east bank of the river all the way to

Hickman. From Hickman south there are levees of the Reelfoot Levee District following close to the river bank. This has created a condition of confinement in the reach of the river south of Cairo. Due to the confinement of part of the water the height of floods has been increased. A plan was adopted by Congress whereby in times of excessive floods the water will be permitted to flow over this levee, but will be

restrained from flowing further west by the back levee 228 of this floodway, which is now constructed, and which follows a line extending from Bird's Point in a generally southwesterly direction to a point on the west bank of St. John's Bayou, across from New Madrid. The existing levee is now constructed to an elevation which varies from about fifty-seven to about fifty-nine in different reaches throughout this front line. Some places it is as high as the equivalent of sixty on the Cairo gauge, which gauge is a concrete slab on the river bank, with the elevation written on an iron plate in that slab, so that you can read the elevation of the water surface in terms of zero on that gauge, so that when one says the present old levee, which follows the contour of the Mississippi River down to a point near New Madrid is between 57 and 59 feet, one means that the criterion is the Cairo gauge. In one of these it would be two feet higher than fifty-five feet, and the other, four feet, so that the equivalent of fifty-five feet on the Cairo gauge means that a flood crest that reaches fifty-five feet at Cairo, as it follows down the river, is equivalent to 55, the height which that flood crest reaches as it passes on down the river, not necessarily the height of the water down below when it is 55 on the Cairo gauge, but the height the water will be down here when this same maximum reaches the point that read 55 feet at Cairo. Witness also referred to a mean gulf level, by which is meant so many feet above the mean sea level at Biloxi, Mississippi. Zero on the Cairo gauge is at elevation $276\frac{1}{2}$ means gulf level. The effective protection which the levee affords is from 57 to $59\frac{1}{2}$. The witness referred to the back water, and stated that there was a system known as the upper St. Francois levee district system, which terminated on the east bank of St. John's Bayou.

When the levee got down to St. John's Bayou, if they had gone across to the ridge at New Madrid where a separate levee system extends, that water would have been bottled up in there so that rain water falling in that territory 229 could not get out; for that reason the levee was ended at the east bank of the Bayou and when the back levee of the floodway was constructed they terminated that levee

also on the east bank of the Bayou, so as not to again cut off this drainage water. The space between the old levee, that is, the levee on the west bank of the river and New Madrid and between the new levee and New Madrid in each case is approximately one-half a mile, so that there is one-half a mile open space where the Mississippi River may flow in or flow out. So that when the water was at bankful stage, the elevation at New Madrid would be approximately 34 on the New Madrid gauge, which is about elevation 288. At a stage of 55 at Cairo, a water surface elevation of approximately 300 mean gulf level would be attained. A day or two later it would produce a water surface elevation of that amount. In other words, the crest has to back up. It takes time to back up in that area, just as it takes time to move down from Cairo to New Madrid. It was proposed by the Project to reduce the effect of elevation of the upper 11 miles of the levee with the exception of one mile, at what is known as the Peafield Sewer, from its present elevation to the equivalent of 55 on the Cairo gauge. That would be done by cutting the top of the levee off. The levee is 15 feet high. It will be cut down to 12 or 13 feet. The present crown of the levee is about 8 feet. After it is reduced, the crown will be about 25 to 30 feet wide. Until the water gets to an elevation of 55, it will have just as much levee protection, or in fact slightly more, due to this material, than it has at the present. In that connection, the cut-off has not yet been made. It will be made sometime in the future. The same thing will be done for the lower five miles, for the purpose there of permitting any water above 55 to pass freely over the top of the levee at that end. If the water surface flow confined above 55 went to 57 say at Cairo, the water would extend further on back and would cover more land. An elevation of 230 300 feet on the Biloxi Scale was equivalent to 55 feet on the Cairo gauge. Any lands that are below 300 elevation would be subjected to flood theoretically, and if the water stayed up long enough those lands, or any part of them, would have water on them, to the extent that they were below 300 feet. The elevation that was above 300 would be above the back water territory and not affected by the back water. The reduction of the levee in the first eleven miles through the territory designated as the Fuse Plug Section would be to make lands within the area subject to overflow in general; that is, those floods, that they are now protected against, which would go over 55 feet, would not go over the present levee, because, of course, any floods that would go over the present levee would over-

flow the land anyhow, and this project would have nothing to do with these. The affected elevation of the front line levee that is going to be reduced now by the Fuse Plug Section is 57 to 57½ feet. Elevations that were taken were platted about every 500 feet. At the extreme upper end there is a difference in elevation of four and a half feet between the top of the present levee and the elevation that will be cut down. There is a difference between an 8 foot crown and a 25 foot crown. It is more the thickness of the levee that governs. The Fuse Plug Section was built with the idea that it was going to be good for 55 feet; that is, a levee which would be 100% effective up to 55 feet. A portion of the levee is built 59 and 60 feet. The average of the levee is between 58 and 59. About 3% or 4% of the levee would be below 58 feet. In other words, there is 96% or 97% of the front line levee which is 58 feet or higher. It might hold some floods at 58, and other floods at 57 might break it, but the witness thought it would be a fair statement to say that it would give effective protection between 57 and 57½ feet, taking all things into consideration. By

the same token, the Fuse Plug might go out below 55. 231 One flood exceeded the 55 foot stage on the Cairo gauge in the last fifty-three years. (The testimony of the witness was given prior to the flood of 1937, which also exceeded the 55 foot gauge.) This witness also testified that there were three floods, which, according to the estimates, would exceed 55 feet on the Cairo gauge, but which would not exceed 57½ feet on the Cairo gauge. They were in the years 1882, 1883, and 1884. Other floods of record, which would have gone over 55 feet, would also have gone over 58 feet under present conditions of confinement, so those three floods in the seventy-four year period of record would make about once in twenty to twenty-five years that this land would be subject to overflow in excess of its present hazard. In 1912, 1913, and 1927 the floods exceeded 57½ feet. Prior to 1937 the highest stage recorded at Cairo was 56.4 feet in 1927.

L. T. BERTHE, testifying for the defendant in the same case, that is, United States vs. Missouri State Life Insurance Company #605, testified that from the records beginning 1880, during the last fifty-three years, this land would be subject to overflow in excess of its present hazards about once in six or seven years, basing his opinion upon the floods of 1883, 1884, 1888, 1897, 1912, 1913, 1916, and 1927.)

This was all of the testimony offered by the Government to sustain the issues in its behalf.

Defendant W. H. Danforth's Case.

Defendant, William H. Danforth, thereupon, in order to sustain the issues in his behalf, offered and introduced the following evidence:

Mr. London: With Your Honor's permission, I would like at this time to offer the Government deed for the easement called for by the petition. If they would pay the award up to the \$31,681.98, I want the record to show then, if you will, that they pay the money in Court, if it hasn't been done heretofore.

JAMES J. O'CONNOR, the Clerk of the Court, testified that no money was paid into the registry of the Court in this case by the United States.

Defendant, Danforth, here offered Depositions taken pursuant to notice of Major General Edward M. Markham, 232 Patrick J. Hurley, and Major Brehon Somervell, at the law offices of Covington, Burling, Rublee, Acheson & Shorb, room 701, Union Trust Building, in the City of Washington and District of Columbia, before Paul J. Robertson, a Notary Public in and for the District of Columbia, on the 7th day of September, 1934, in cause No. 716 Law (Tracts 243 and 281), pending in the United States Court for the Eastern Judicial District of Missouri, Southeastern Division, cause being between the United States of America, plaintiff, and Beatrice McDaniel, William H. Danforth, et al., defendants, on the part of the defendant, William H. Danforth, pursuant to notice to take depositions and a commission to take depositions and stipulation annexed between the plaintiff and said defendant, William H. Danforth, at which were present:

Aubrey Lawrence, Esquire, Special Assistant Attorney General, on behalf of the United States of America;

J. L. London, Esquire, on behalf of the defendant, William H. Danforth;

Mr. Paul J. Robertson, the notary public and shorthand reporter.

Mr. Lawrence: Prior to the taking of my testimony, the plaintiff objects to the jurisdiction of the Court to hear or determine any matter under the counterclaim pleaded in the answer in this case, for the reason that the Court has no

jurisdiction of the subject matter and for the further reasons:

First, that the counterclaim constitutes a separate cause of action in the nature of a cross-complaint and is a suit against the United States brought without its consent and without authority of law.

Second, that the Court has no jurisdiction of the subject matter set out in the counterclaim.

Third, that, the United States, having withdrawn its offer to accept the property and pay the amount claimed by said counterclaim, is not before the Court for the purpose
233 of fixing the value of the property as set out in said counterclaim, and that there is no action pending before the Court upon which the counterclaim may be based.

Mr. London: I object, on the ground that the objection set out by the plaintiff has no place in the taking of the depositions; and on the further ground that the action is now pending before the Court, involving identically the same property involved in the counterclaim. The plaintiff has never withdrawn its demand for the easement in question, and, on the contrary, is asserting the right to the same and has voluntarily brought proceedings in this Court praying for title to the easement in the lands in Tracts 243 and 281, in Case No. 716.

Mr. London: I offer the deposition of General Edward M. Martin.

Mr. Dyott: We renew our objection to that testimony as bearing upon collateral matter; it doesn't tend to prove or disprove any evidence in this particular hearing on matters in condemnation; this is purely a hearing upon the value of the flowage easement, it being wholly a condemnation proceeding and the deposition offered has to do with a matter which has no part in the matter of values to which this hearing is entirely devoted, but to the contrary, upon an alleged contract which, if it would be pertinent at all, would be to a separate suit on a contract against the Government, and could not be enquired into in a hearing of this nature; and further, it is incompetent and irrelevant.

The Court: Overrule the objection.

Mr. Dyott: Save my exception.

MAJOR GENERAL EDWARD M. MARKHAM testified that he was Chief of Engineers, United States Army, and had been Chief

of Engineers since October of the preceding year. His predecessor was General Lytle Brown. As Chief of Engineers the witness was connected with the Flood Control Act and the projects for the Bird's Point-New Madrid Floodway, and at the time of the taking of the depositions was in charge of the work. The work was still going on. He knew Major Brehon Somervell, who was an officer of the Corps of Engineers. While Major Somervell was stationed at Memphis, Tenn., witness was not in charge of the Engineering Department of the United States Army. He was not familiar with Case No. 716, the suit in question. He knew G. B. Pillsbury, who is assistant to the Chief of Engineers, and was Assistant to the Chief of Engineers in November, 1931. The witness knew the signature of the said Pillsbury.

Witness was shown Defendant Danforth's Exhibit A, a document consisting of six sheets, numbered A-1, A-2, A-3, A-4, A-5, and A-6, respectively, and identified the signature of G. B. Pillsbury and D. O. Elliott on page A-1; of Brehon Somervell and T. H. Jackson on page A-3; of John J. Kingman and D. O. Elliott on page A-4; and of Brehon Somervell and T. H. Jackson on page A-5.

Witness was asked with reference to the usual method or way of issuing instructions through military channels to officers in the Engineering Department. Counsel for the plaintiff objected on the ground that it was immaterial and not competent to prove any issue in the case, the question being one of contract. The witness testified that the Chief of Engineers, in person or by one of his assistants, would devise, after conference, a conclusion as to what class of instructions were appropriate, and would send such, in writing usually, to the subordinate officer, signed either in person or by the Chief Engineers or signed by one of the pertinent subordinates by his authority. That these instructions would be strictly in accordance with what the witness observed on page A-1, started by General Pillsbury, and followed through the successive pages to page A-5. Witness observed nothing that was irregular or unusual in the conduct of the business of the office of Chief of Engineers.

Witness testified that General Lytle Brown is in Panama and reported for duty in Panama in December preceding the taking of the deposition; that General Lytle Brown was not under his jurisdiction, but under that of the Chief of Staff and the Secretary of War.

Witness recognized all of the signatures on the document marked Defendant Danforth's Exhibit A. His position in the Army on November 30, 1931 was Divi-

sion Engineer, Great Lakes Division. He had nothing to do with the flowage project in Missouri at that time. The Secretary of War was in charge of the project, and was in charge of the project on November 30, 1931. Instructions come from the Secretary of War, having to do with matters that appropriately would be for his approval and attention.

The witness was shown a document dated November 17, 1931, consisting of two pages, which for the purpose of the record were marked Defendant Danforth's Exhibit B, pages B-1 and B-2. He testified that he recognized General Lytle Brown's signature on there. The signature below Lytle Brown's signature, the witness thought was the signature of Patrick J. Hurley.

Q. I might state, General, that we have stipulated in this case that there is no dispute about the signatures.

A. Yes, sir.

The witness testified that by "Press Release," marked B-2, is meant, that in the office of the Chief of Engineers, and for the purpose of giving appropriate information to the representatives of the press concerned in their affairs, there is an officer who, upon conclusion of a matter of this kind, will write such a press release as is here indicated and, if pertinent and appropriate, with the approval of the Chief of Engineers or the Assistant to the Chief of Engineers, will hand such press release out to those of the press who request it. Such a press release was attached to this memorandum of November 17, 1931, which was a request to the Secretary of War by General Brown for authority to make settlements.

Mr. London: I now offer in evidence the memorandum of November 17, 1931, and the press release attached to it as the Defendant Danforth's Exhibit B.

Defendant Danforth's Exhibit B is in words and figures as follows, to-wit:

MICRO CARD

TRADE

MARK



22

39

2

1642



65



ADDRESS REPLY TO
CHIEF OF ENGINEERS, U. S. ARMY
WASHINGTON, D. C.

WAR DEPARTMENT
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON

November 17, 1931.

Subject: Payment for flowage in the New Madrid Floodway.
To: The SECRETARY OF WAR.

To expedite the settlement of flowage easements in the New Madrid Floodway, I recommend that I be authorized to offer to the owners of lands in this floodway payment for flowage easements at the maximum rates authorized by the order of President Coolidge dated December 11, 1928, and where the appraisals of flowage now being made by the Department of Agriculture exceed the rates fixed in said order, to pay the appraised value so determined.

Lytle Brown

Lytle Brown,
Major General,
Chief of Engineers.

One inclosure (Press Release)

Approved November 25th, 1931.

Patrick Hurley
Secretary of War.

5900 (Misc. R. - New Madrid Floodway) 339

File in New Madrid Floodway

adw.

20 1931

Eng.

November 17, 1931. *112*

P R E S S R E L E A S E

The authorized project for flood control in the Mississippi River includes a floodway for the escape of excess flood waters, extending from the vicinity of Cairo to New Madrid. The act authorizes the payment of flowage rights for additional destructive flood waters that will pass by reason of diversions of the main channel of the Mississippi River. President Coolidge, in authorizing the undertaking of this floodway, limited the price to be paid for flowage rights to 66 per cent of the then assessed value of the land for lands not ordinarily covered by the backwater of floods, and at prices ranging from 66 per cent of the assessed value of the land at the upper limit to zero at the lower limit of the backwater area within the floodway. He also authorized the purchase of land within the floodway immediately adjacent to the proposed relief section of the river-side levee (about 3200 acres) at prices not more than twice the then assessed value of the land.

To expedite the settlement of the flowage questions in this floodway, the Secretary of War has authorized the Chief of Engineers to offer to the land holders the maximum prices provided in this Presidential order. Furthermore, where such prices are less than the estimated value of the flowage easements as determined by appraisals now being made by the Department of Agriculture, the Secretary has authorized the Chief of Engineers to offer the full appraised flowage value so determined.

200

237-a I also offer in evidence the six pages marked Defendant Danforth's Exhibit A, numbered A-1 to A-6, and each of them.

Said exhibits are as follows:

DEFENDANT DANFORTH'S EXHIBIT A.
(consisting of sheets A-1, A-2, A-3, A-4, A-5, and A-6).
WAR DEPARTMENT

ADDRESS REPLY TO
CHIEF OF ENGINEERS, U. S. ARMY
WASHINGTON, D. C.

OFFICE OF THE CHIEF OF ENGINEERS

WASHINGTON

REFER TO FILE NO. **6500(Miss.R.-New Madrid
Floodway) 329**

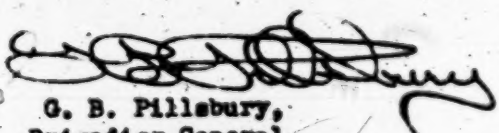
November 30, 1931.

6500(Miss.R.-New Madrid Floodway)329
Sub. 1 Accomps.

Subject: Offers for Flowage in New Madrid Floodway.

To: The President,
Mississippi River Commission,
P.O.Box 665,
Vicksburg, Miss.

1. The Secretary of War has approved the recommendation of the Chief of Engineers that to expedite the settlement of flowage easements in the New Madrid floodway, he be authorized to offer to owners of lands in this floodway payment of flowage easements at the maximum rates authorized by President Coolidge in an order dated December 11, 1928, and where the appraisals of flowage now being made by the Department of Agriculture exceed the rates fixed in said order, to pay the appraised value so determined.
2. Offers to land owners will be made accordingly as fast as the appraisals for flowage for the tracts have been completed by the Department of Agriculture. These offers are necessarily contingent upon clear title. The status of titles in the floodway is such that the offers and acceptances are equivalent to a request to the court for an agreed verdict awarding the sums offered.
3. It is desired that the reports by the District Engineer showing the status of the appraisals being made, be amplified to include tabulations showing what is being done with respect to the offers directed above.


G. B. Pillsbury,
Brigadier General,
Acting Chief of Engineers.

3229/102/62

1st Ind.

wt

Office, President, Mississippi River Commission, Vicksburg, Miss., Dec. 7,
1931 - to the District Engineer, U. S. Engineer Office, Memphis, Tenn.

Subject: Offers for Flowage in New Madrid Floodway.

2d Ind.

U. S. Engineer Office, Memphis, Tenn., Dec. 15, 1931 - To the Chief of Engineers, U. S. Army (through the President, Mississippi River Commission, Vicksburg, Miss.).

1. Pursuant to instructions contained in paragraph 2 of basic letter, offers are being prepared covering all tracts in the Bird's Point-New Madrid Floodway on which settlement has not yet been reached. These will be mailed shortly after Jan. 1, 1932, the date on which appraisals now being made by the Department of Agriculture will be completed. Action cannot be taken by the Court on these until the April session.

2. Prior to issuance of these offers it is desired to invite attention to the following:

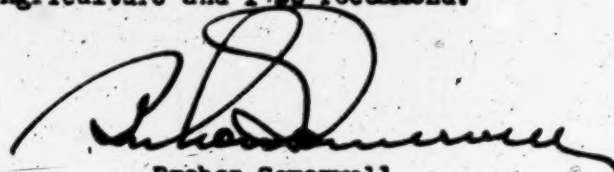
a. Previous offers made by the Department were not the maximum authorized by President Coolidge but those covered by a schedule approved by the Chief of Engineers under date of March 13 and April 30, 1929. Copy of this schedule is inclosed marked "A". It will be noted that the schedule provides for payment of the maximum authorized by President Coolidge only on the farm lands and not the timber land in the backwater (country similar to that recently inspected by the Chief of Engineers). The total amount of the offers previously made equals approximately \$1,800,000. The amount directed to be paid in basic communication based on appraisals to date is estimated at \$2,715,815, or an increase of \$915,815. On the 21 Gilchrist tracts in the back water the offer directed in letter of November 30 amounts to \$410,712. The previous offers amounted to \$87,255.37, making an increase of \$323,456.63 or about 400%. The advance figure furnished by the Department of Agriculture as to the actual value of flowage over this land is \$28,770.20, or 1/15, approximately, of the amount which the Chief of Engineers proposes to offer for these easements.

b. Based on the completed appraisals by the Department of Agriculture (460 tracts out of 660), the total value of flowage easements in the floodway is \$1,632,415, or \$1,083,400 less than the amount ordered to be paid in the letter of November 30. Final appraisals on the remaining tracts may increase this difference.

3. In view of the wide discrepancy between the amounts fixed in basic letter (in one case a ratio between the price to be offered and the actual value of 15 to 1 or \$323,456.63), it was thought that these facts should be brought to the attention of the Chief of Engineers before the actual offers were made.

DEFENDANT DANFORTH'S EXHIBIT A-3.

4. It is believed that the Department should not agree prior to Court action to any figure greater than that determined by the corps of experts furnished by the Department of Agriculture and I so recommend.



Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

Incl. - Schedule "A".

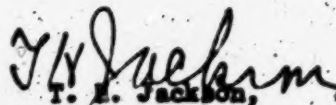
5229/102/82

3d Ind.

EC

Office, President, Mississippi River Commission, Vicksburg, Mississippi —
December 18, 1931 — To the Chief of Engineers, U.S. Army, Washington, D.C.

1. Forwarded.



T. E. Jackson,
Brig. Gen., Corps of Engineers,
President of the Mississippi
River Commission.

Encl.

Schedule "A".

6500 (Miss. R. New Madrid Floodway) 338

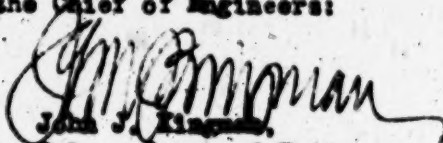
Subject: Offers for Flowage in
the New Madrid Floodway.

4th Ind.

Office, C. of E., December 22, 1931.-- To the President, Mississippi River
Commission, Vicksburg, Miss.

Copy of the order of President Coolidge dated December 11, 1928, is
attached. Offers will be made, as directed, for payment of flowage easements
over lands above and over lands included in the backwater area respectively,
at the maximum respective rates authorized in the order. Attention is
invited to the provisions of the order under which the maximum rates vary
according to location in the backwater area. Where appraisals of flowage
now being made by the Department of Agriculture exceed the rates fixed in
said order, offers will be made to pay the appraised value so determined.

By direction of the Chief of Engineers:


John J. Ringman,
Lieut. Col., Corps of Engineers.

One inclosure.

3229/102/82

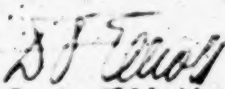
5th Ind.

IC

Office, President, Mississippi River Commission, Vicksburg, Mississippi,
December 26, 1931 - To the District Engineer, Memphis Engineer District,
Memphis, Tenn.

1. To note and return.

For the President of the Mississippi River Commission:


D. O. Elliott,
Major, Corps of Engineers,
Assistant to the President, M.R.C.

1 encl.

6500 (Miss. R. New Madrid Floodway) 338 Subject: Offers for Flowage in
the New Madrid Floodway.

M37/7/701

6th Ind.

U. S. Engineer Office, Memphis, Tenn., Jan. 20, 1932. - To the Chief of
Engineers, U. S. Army (through the President, Mississippi River Commission,
Vicksburg, Miss.).

1. Offers have been made as directed for all known tracts and as
shown on the inclosed tabulation (Form 104). The offers made, exclusive
of previous offers accepted and settlements made (\$26,890.48) amount to
\$2,429,335.26 or 14 3/4% of the U. S. Department of Agriculture flowage
appraisal (\$1,701,584.85). For the twenty-one Gilchrist tracts covering
20,099.41 acres the offers amount to \$394,859.51, or 1,259% of the U. S.
Department of Agriculture appraisals (\$31,355.97).

2. On about Feb. 15, 1932, or 30 days after offers were made, a
report as to acceptances received will be submitted.



Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

Addl.
Incls. - Tabulation (Form 104) in
17 sheets (in dup.).

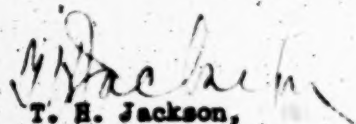
5229/102/82

7th Ind.

EC

Office, President, Mississippi River Commission, Vicksburg, Mississippi --
January 21, 1932 -- To the Chief of Engineers, U.S. Army, Washington, D. C.

1. Forwarded.



T. H. Jackson,
Brig. Gen., Corps of Engineers,
President of the Mississippi
River Commission.

JA 11 22
Sub. 2 and 1 incl. unmkd. copy.
Encls.

Copy of order of Pres. Coolidge, dated

December 11, 1928;

Tabulation (Form 104) in 17 sheets, in dupl.

DEFENDANT DANFORTH'S EXHIBIT A-6.

6500(Miss. E. New Madrid Floodway) 11/16/1

"A"

NEW MADRID FLOODWAY

Schedule for making flowage offers approved by C. of E. March 13, 1929,
and April 30, 1929.

Above Backwater.

Classification of Land.	Maximum price authorized
1 - Lakes, open water, etc.	: None
2 - Swamps and marsh land.	: Flat rate \$1 per acre.
3 - Timber land.	: 10% of assessed value
4 - Cut-over land.	: 40% of assessed value
5 - Farm land:	:
Class A (cultivated)	: 60% of assessed value
Class B (not cultivated)	: 60% " " "
6 - Town and village property	: By special agreement and authority
	: in each case.
7 - Industrial property.	: "
8 - Schools and churches.	: "

In Backwater.

1 - Lakes, open water, etc.	: None
2 - Swamps and marsh land.	: Flat rate \$1 per acre
3 - Timber land.	: Var. from 10% of assessed value
	: to \$1 per acre.
4 - Cut-over land.	: Var. from 40% to \$1.
5 - Farm land:	:
Class A (cultivated)	: Var. from 60% to \$1.
Class B (not cultivated)	: " " " "
6 - Town and village property.	: By special agreement and authority
	: in each case.
7 - Industrial property.	: "
8 - Schools and churches.	: "

United States Engineer Office, Memphis, Tennessee, December 15, 1931.

44 Mr. Lawrence: The plaintiff objects to the introduction in evidence of each and all of the exhibits offered, together or separately, upon the grounds and for the reasons following:

(Objection of Plaintiff to Offer of Exhibits.)

First, that the same is irrelevant, incompetent, and immaterial and does not tend to prove any issue in the case.

Second, that the offer is made for the avowed purpose of establishing a contract which by its terms fixes the amount of compensation to be paid to defendant and the amount of judgment to be entered by the Court and precludes the Court from determining the value of the property and the amount of compensation to be awarded the land owner and is void as against public policy.

Third, that the exhibits in question are offered for the purpose of establishing an alleged contract fixing the amount of judgment to be rendered in a judicial proceeding; whereas, by the terms thereof, it is a mere contingent and conditional offer and acceptance to be submitted to the Court and is not binding on the Court and does not become a complete contract without the sanction and approval of the Court.

Fourth, that the exhibits in question are offered for the purpose of establishing an alleged contract which is void as a matter of law in that the contract in question was made without the inclusion of the clause required by section 22, Title 41, U. S. C., to the effect that no Member or Delegate to Congress is admitted to any share or part of such contract or agreement or to any benefit to arise therefrom, which said statute is applicable to contracts under the Flood Control Act by reason of Section 202(m), Title 33, U. S. C.

Fifth, that the same was made without authority of law and by persons not authorized to contract in behalf of the United States, and that if authorized to make such offer the same did not become complete until accepted and approved by the Secretary of War.

Sixth, that prior to the submission of the same to the Court for approval and before any judicial action thereon the same was withdrawn and any alleged contract therefore did
245 not become complete or binding upon the parties thereto.

Seventh, that no condemnation proceeding following the offer and acceptance has been had; that the United States

refused to pay the amount fixed; and that the proceeding being a mere inquisition to determine the value of the property for the purpose of ascertaining whether the Government would pay such price or accept the property, was withdrawn.

The witness was asked with reference to a document consisting of four pages, to which were attached six pages of figures relating to offers made at maximum under order of President Coolidge, considered excessive, with recommendation of fair and reasonable offers, and he identified on page 2 the signatures of Lytle Brown, Chief of Engineers, and of Patrick J. Hurley, Secretary of War, and on page 3 the signatures of John J. Kingman, Lieutenant Colonel, Corps of Engineers, and of W. M. Hoge, Major, Corps of Engineers, and on page 4 the signature of T. M. Jackson, Brigadier General, Corps of Engineers. He stated he was seeing those figures tabulated for the first time.

Mr. London: We will mark those documents Defendant Danforth's Exhibit C, and number the pages C-1 to C-10, inclusive. I am not offering those in evidence. I am simply identifying them.

(The documents so produced and identified are filed with the deposition, marked by the notary Defendant Danforth Exhibit C, sheets C-1 to C-10, for identification.)

A. (Continued) If you wish comments on these tables they appear to be normal tables, such as would pass through the office of the Chief of Engineers in conjunction with the basic file.

The witness identified the letter dated November 16, 1934, and stated he had seen little of the signature of Kelton and would be unable to identify it upon this letter; that if a presumption was worth anything he thought that was the signature of Edwin C. Kelton. This letter was marked Defendant Danforth's Exhibit D.

On Cross-Examination General Markham testified over defendant's objection, that the question called for a conclusion, and on the ground that the instrument speaks for itself, that Exhibit A, in its various parts, what is known as an inter-departmental transaction. It was solely a memorandum passing between the various officers of the Department, with the indorsements as they were transmitted and forwarded to other officers of the Corps of Engineers, subject to whatever authoritative instructions are contained therein. So far as the witness knew, all these papers remained in the file, in control of the War Department and of the Chief of Engineers, until produced in Court.

Q. And is there anything to indicate—either in the exhibits or in your knowledge of the custom that you referred—that would tend to show that the defendant in this case had any knowledge or information with reference to this interdepartmental transaction?

Mr. London: That is objected to, because the instruments speak for themselves.

Mr. Lawrence: I speak also of the custom.

A. Unless it is stated in this file that some authoritative person of the Department has informed the defendant, I see nothing in the file per se suggestive that the defendant would have had any knowledge whatsoever.

Mr. Lawrence: The matters referred to, then, were pure matters within the jurisdiction and cognizance of the War Department?

Mr. London: I object to that, as leading and suggestive, and it is not covered by the direct examination.

A. That would appear so from the file.

Mr. Lawrence:

Q. And the same situation exists with reference to its being an interdepartmental transaction? A. Yes.

Q. The same situation applies to Exhibit B, General?

Mr. London: The same objection.

A. This would be interdepartmental, without knowledge of the defendant unless he had knowledge through the press release, being Exhibit B-2.

Witness testified that he had identified the signatures on Exhibit C. This was also an interdepartmental transaction.

Mr. Lawrence: We offer in evidence Exhibit C and all parts thereof.

Mr. London: Objected to on the ground that it is immaterial, on the ground that it is not part of the plaintiff's case, and on the grounds that it is incompetent and it was withdrawn after acceptance.

The document so offered in evidence by plaintiff was filed with the deposition, marked by the notary Defendant Danforth's Exhibit C (sheets C-1 to C-10) for identification, and further marked by the notary Plaintiff's Exhibit 1 Markham.

Said Exhibit is in words and figures as follows, to-wit:

DEFENDANT DANFORTH'S EXHIBIT C.
(consisting of sheets numbered C-1 to C-10, both inclusive)
PLAINTIFF'S EXHIBIT 1 MARKHAM.

LETTERS REPLY TO
CHIEF OF ENGINEERS, U. S. ARMY
WASHINGTON, D. C.

WAR DEPARTMENT
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON

REPORT TO FILE NO. _____

April 4, 1932:

Subject: Flowage and Land in New Madrid Floodway.

To: THE SECRETARY OF WAR.

1. On August 11, 1928, President Coolidge authorized the purchase of flowage easements in the New Madrid Floodway at prices based on assessed values provided not over certain limiting prices be paid. At the same time he authorized the purchase in fee simple of the land adjacent to the relief levee (about 3200 acres) provided not over twice assessed values should be paid for these titles.

2. In 1931 the lands in the New Madrid Floodway were appraised by the Department of Agriculture both as to full values and flowage values.

3. On November 25, 1931, the Secretary of War authorized that offers be made for flowage in the floodway either at the maximum prices authorized by President Coolidge or at the appraised values of the Department of Agriculture whichever price in each case was larger, the offered prices if accepted to be presented to the court for agreed verdicts. These offers were made and in many cases they were accepted. It has developed that a number of offers made under the Coolidge authorization were so greatly in excess of actual values that it is not proper to consummate the negotiations nor to ask the District Attorney to agree to the prices offered. Fortunately only 25 offers considered excessive have been accepted.

4. This entire matter has been reviewed by the District Engineer who after consultation with the District Attorney recommends as follows:

(a) Flowage

Withdraw 113 offers made but not accepted,

Withdraw 25 offers made and accepted,

Withdraw Total 138 as shown on the attached tabulation entitled -

"Flowage cases of the New Madrid Floodway where offers made at maximum under order of President Coolidge are considered excessive with recommended fair and reasonable offers."

6500(Miss. R.-New Madrid Floodway)400
Sub. 1 accounts

File
JWK

-2-

Letter to Secretary of War.

With respect to the 113 offers not accepted to make no new offers but to plead in court for the prices shown in Column 8 of the tabulation or if approached to treat with owners on the basis of these prices.

With respect to the 25 offers accepted to make new offers and plead in court for the prices shown in Column 8 of the tabulation.

(b) Fee Simple Title

Withdraw all flowage offers (29) with respect to about 3800 acres adjacent to the relief levee as shown on attached tabulation entitled "Tracts of New Madrid Floodway lying within one half mile of upper fuse plug section of front line levee" and to make offers for the fee simple title to these lands at prices shown in Column 6 of the tabulation.

5. Authority is requested to carry out the procedure recommended by the District Engineer.

Lytle Brown

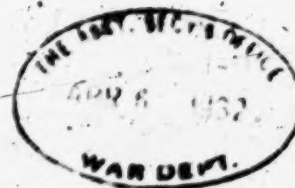
Lytle Brown,
Major General,
Chief of Engineers.

asw

Inclosure -
Tabulations

Approved April 7, 1932.

Samuel H. Hurley
Secretary of War.



Inclosure -
Tabulations.

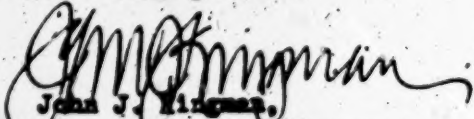
o500(Miss.R.-New Madrid Floodway)-400 Subject: Flowage and Land in New
Madrid Floodway.

2d Ind.

Office, C. of E., April 11, 1932. -- To the President, Mississippi River
Commission, Vicksburg, Miss.

Attention is invited to the action of the Department as shown
by the foregoing letter and indorsement, by which you will be guided.

By direction of the Chief of Engineers:


John J. Higgins,
Lieut. Col., Corps of Engineers.

Sub 1 accomp'g.

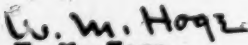
Ed Ind.

EC

Office, President, Mississippi River Commission, Vicksburg, Mississippi —
April 14, 1932 — To the District Engineer, U. S. Engineer Office, Memphis,
Tenn.

1. To note and for compliance.

For the President of the Mississippi River Commission:


W. M. Hoge,
Major, Corps of Engineers,
Assistant to the President
M.R.C.

Sub. 1 accomp'g.

15 1932

Subject: Flowage and Land in New Madrid Floodway.
6500(Miss.R.-New Madrid Floodway)-400

4th Ind.

U. S. Engineer Office, Memphis, Tenn., April 15, 1932. To
the President, Mississippi River Commission, Vicksburg,
Miss.

Noted.

BS
B. S.

Inclosure-
No change.

3220/102/118 5th Ind. IC
Office, President, Mississippi River Commission, Vicksburg, Mississippi,
April 16, 1932 - To the Chief of Engineers, U. S. Army, Washington, D.C.

1. Forwarded.

T. H. Jackson
T. H. Jackson,
Brig. Gen., Corps of Engineers,
President, Mississippi River Commission.

APR 1

Sub.1 accomp.

6500 (Hues. R. New Madrid Floodway) 400/

From a review of the New Madrid Floodway where offers made at minimum under order of President
 Coalitions are considered excessive with recommended fair and reasonable offers.

1	2	3	4	5	6	7	8	9
Tract No.	Unit No.	Acres	Pres. Coal- idge's Max. Price (Offer made)	U.S.D.A. Floodway Appraisal Amount Per Acre	Ratio Offer Per Acre	Excess of offer over Appraisal Amount Per Acre	Recom- mended Offer Per Acre	Remarks 1 - Minimum of \$1.60 per acre
21		352.72	2,708.00	6,532.00:10.34	1.48	3,824.00:8.99	6,532.00	
29	549	40.00	307.00	344.00:8.11	3.98	711.40:17.81	344.00	
30	549	80.00	2,478.00	335.00:10.52	2.86	1,609.00:10.12	335.00	
32		1,680.00	38,712.00	19,850.00:11.39	1.81	17,441.90:10.31	19,850.00	
34		140.04	3,851.10	2,342.00:16.11	1.81	1,499.01:9.22	2,342.00	
35		310.05	10,012.00	8,347.00:26.78	1.12	1,665.00:5.43	8,347.00	
38	577	180.00	3,300.00	1,801.00:11.78	1.83	1,497.00:9.38	1,801.00	
39		180.00	3,300.00	2,309.00:12.06	1.47	1,289.00:9.38	2,309.00	
39		380.00	8,187.00	4,021.40:14.39	1.53	2,165.10:7.71	4,021.40	
53		107.96	3,280.00	2,304.40:12.04	2.11	2,775.60:17.38	2,304.40	
99		340.34	7,095.00	3,992.00:11.08	1.78	3,103.00:8.61	3,992.00	
100		80.00	885.00	380.00:5.69	2.79	505.00:6.62	380.00	
102	577	320.00	8,314.00	6,809.00:21.08	1.22	1,505.00:4.71	6,809.00	
106	603	743.00	19,239.00	17,099.00:22.41	1.12	2,140.00:2.80	17,099.00	
107	502	60.00	2,478.00	1,735.00:21.74	1.42	733.00:9.20	1,735.00	
112		180.00	3,300.00	1,828.00:11.04	1.71	1,376.00:9.59	1,828.00	
112	582	120.00	2,970.00	1,442.00:12.06	2.06	1,528.00:12.70	1,442.00	
114		600.00	14,817.00	11,469.00:19.11	1.29	3,347.00:5.58	11,469.00	
118		38.79	987.00	532.00:17.56	1.82	455.00:11.12	532.00	
124		80.00	1,401.00	522.00:6.57	2.68	879.00:11.01	522.00	
136	603	300.00	4,970.00	3,477.00:19.14	1.33	1,493.00:5.71	3,477.00	
137	587	240.00	6,864.00	4,680.00:19.50	1.42	2,184.00:8.57	4,680.00	
138	328	300.00	3,002.00	42.00:1.23	80.42	2,960.00:14.79	300.00	
139		196.36	4,115.00	804.10:4.12	5.14	3,310.90:19.00	804.10	
141		140.00	2,807.00	1,092.10:8.84	2.38	1,714.90:9.45	1,092.10	
146		100.00	2,079.00	1,125.00:11.00	1.75	954.00:8.94	1,125.00	
149	204	80.00	1,718.00	902.40:11.28	1.89	815.60:10.19	902.40	
150		280.00	6,715.00	4,887.00:16.39	1.46	2,128.00:7.80	4,887.00	
161		544.05	10,878.00	9,533.00:16.88	1.11	1,044.90:1.88	9,533.00	

DEFENDANT DANFORTH'S EXHIBIT C-5.

Tract No.	Lot No.	Acres	Free. Coal- ridge's Mex.	U.S.D.A. Flawage Approval	Ratio Offer	Amount of offer over Appraisal	Amount Offer	Remarks
			Price (Offer made)	Amount Offer	Ratio Offer	Amount Offer	Amount Offer	Remarks
								Minimum of 1.00 per acre
170	603	450.00	12,474.00	9,174.00	19.11	1.36	3,299.00	6.07
172		97.41	1,221.00	601.00	10.48	2.05	619.00	10.79
173	609	85.85	2,876.00	1,897.00	21.74	1.87	808.00	5.91
176		87.87	2,324.00	1,642.00	13.73	1.42	684.10	7.80
180		40.00	445.00	54.00	1.37	9.07	440.00	11.01
188	604	157.82	4,024.00	1,007.00	6.22	4.00	3,019.00	19.13
198	607	180.00	3,940.00	3,247.00	10.30	1.22	712.40	4.43
200		240.00	6,950.00	5,005.00	13.90	1.28	1,945.00	5.35
201	603	512.80	7,798.00	2,643.00	5.19	2.85	5,155.00	10.01
205	604	225.73	5,544.00	3,034.00	10.89	1.76	2,511.00	8.16
207		1,545.19	22,098.00	20,439.00	19.66	1.11	1,659.00	2.10
214		126.00	2,970.00	943.00	5.03	3.08	2,027.00	16.78
215		225.01	6,722.10	5,184.40	21.07	1.50	1,537.70	6.33
226		32.13	680.00	178.00	5.74	3.88	514.00	16.38
227		80.00	1,534.00	386.00	4.83	3.97	1,148.00	14.25
229		187.10	2,779.00	2,541.00	13.38	1.47	238.00	6.35
238		171.28	5,033.00	442.00	1.58	11.25	4,591.00	26.01
238-1	609	160.00	1,472.00	129.00	.81	11.34	1,343.00	8.39
237	609	40.00	841.00	84.00	.87	10.43	757.00	8.18
243		1,023.84	31,021.00	14,825.00	14.32	1.89	16,196.00	14.33
244		80.00	900.00	415.00	5.14	2.40	485.00	7.21
246		400.00	5,325.00	3,521.00	6.50	1.50	1,804.00	4.40
250		240.00	3,338.00	1,607.00	6.90	2.00	1,731.00	6.35
254		800.00	9,079.00	6,214.00	7.77	1.56	2,865.00	4.33
254-1		378.44	10,405.10	9,189.00	24.50	1.14	1,216.10	3.48
259		64.18	1,841.00	884.00	9.10	3.19	1,957.00	19.00
260		40.00	1,266.00	63.00	1.59	21.79	1,203.00	23.06
261	604	746.27	10,259.70	3,040.40	4.11	5.37	7,219.30	9.77
267		80.00	1,080.00	790.00	9.88	2.13	290.00	11.16
268	607	119.90	996.19	807.00	4.90	1.70	408.00	3.41
268		5.00	2,722.00	24.00	-	-	2,746.00	5.20

DEFENDANT DANFORTH'S EXHIBIT C-6.

Tract, Sub- No. : No.		Acres	Pres. Cool- ider's Mar. Price (offer made)	U.S.D.A. Pledge Amount \$	Ratio For 100 Acres	Ratio Offer \$	Amount of offer Offer \$	Amount Offer \$	Remarks
269	604	242.91	4,313.93	3,001.80	12.36	1.44	1,312.13	5.40	3,001.80
272		606.25	4,136.47	37.30	.06	110.90	4,099.17	6.76	606.25
275		80.00	705.38	-25.26	-	-	770.64	9.13	80.00
279		397.92	2,161.90	80.80	.20	27.02	2,081.90	5.24	397.92
281		400.00	2,208.94	-9.48	-	-	2,218.42	5.95	400.00 offer accepted.
282		100.00	693.00	68.60	.69	10.20	624.40	6.24	100.00
283		160.00	998.13	-51.48	-	-	979.61	6.12	160.00
286		80.00	996.88	36.30	.98	12.03	910.98	6.38	80.00
306		80.00	577.90	157.85	1.97	3.66	419.65	5.25	157.85
307	13,795.17	277,807.42	23,690.25	1.72	11.75	24,157.17	23,690.25	12.42	23,690.25 offer accepted.
321	604	80.00	612.96	130.80	1.64	4.68	481.76	6.02	130.80
330	989	100.00	612.96	88.60	.89	6.91	523.96	5.24	100.00
331		600.00	9,361.69	7,625.00	12.71	1.23	1,736.69	2.89	7,625.00
339	604	120.00	1,099.90	378.60	3.16	2.75	620.90	5.91	378.60
342		80.00	1,848.80	61.02	.76	30.29	1,786.80	2.34	80.00 offer accepted.
345		2,858.21	51,298.40	3,323.98	1.16	15.45	47,974.92	16.78	3,323.98 offer accepted.
345A		40.00	1,195.00	20.09	.90	57.49	1,134.91	28.37	40.00 offer accepted.
347		87.81	742.90	170.95	1.95	4.34	571.95	6.91	170.95
353		170.13	2,442.00	7,162.20	12.68	1.31	2,298.84	3.96	7,162.20
353A		394.71	6,999.94						
352	1,446.88	41,754.28	38,099.25	25.97	1.10	3,675.03	2.49	38,099.25	
363		64.28	1,980.00	1,981.00	24.60	1.25	399.00	6.21	1,981.00
366	946	40.00	371.25	-24.00	-	-	385.25	9.63	40.00
371		80.00	2,772.00	129.40	1.64	21.42	2,642.60	33.03	129.40 offer accepted.
372	947	160.08	668.25	172.90	1.08	3.87	495.75	3.10	172.90
384		80.00	994.00	64.80	.82	9.05	928.80	6.60	80.00
390	991	499.51	12,461.62	11,425.80	24.87	1.09	1,035.82	2.25	11,425.80
391	948	80.00	1,732.90	1,061.00	13.26	1.63	671.90	8.39	1,061.00
397	952	80.00	1,423.12	1,020.40	12.76	1.39	402.72	5.03	1,020.40
400		393.85	10,098.00	7,703.40	19.96	1.31	2,394.60	6.08	7,703.40

DEFENDANT DANFORTH'S EXHIBIT C-7.

1	2	3	4	5	6	7	8	9
Tract No.	Acres	Pres. Coolidge's bid	U.S.D.A. Floorbid	Ratio	Excess of offer over floorbid	Recommended		
No.		(Offer made)	Amount	Per Acre	Amount	Per Acre	Offer	Remarks
403		213.56	3,368.06	2,096.40	9.82	1.61	1,271.66	5.95
413		380.89	5,326.68	2,872.26	7.35	1.93	2,454.42	6.73
422		40.00	449.90	45.40	1.14	9.81	400.10	10.00
424	544	80.00	394.00	-14.00	-	-	410.00	5.13
425	537	165.94	732.00	-20.70	-	-	802.90	4.85
430		80.00	1,293.19	912.60	11.43	1.42	380.99	4.76
438		40.00	974.88	51.00	1.28	10.92	905.88	12.65
439		40.00	429.16	120.00	3.00	3.94	309.16	7.63
441		80.00	2,310.00	184.10	2.30	12.95	2,125.90	26.97
443		80.00	1,782.00	65.60	.82	27.16	1,716.40	21.46
444		40.00	449.90	93.44	2.33	4.77	356.46	8.79
449		207.02	4,903.03	3,613.00	17.52	1.36	1,290.03	6.23
452		40.00	1,188.00	32.90	.82	36.11	1,155.10	28.88
463		163.22	1,093.95	121.27	.74	9.02	972.68	5.96
477		80.24	2,079.00	-1.78	-	-	2,080.78	25.93
478		11.42	449.80	449.80	39.39	1.00	-	-
479		40.00	330.00	-3.90	-	-	333.90	8.34
480		387.78	2,314.32	1,184.80	3.48	1.95	1,129.52	3.31
481	534	189.62	1,367.62	1,374.90	7.14	1.45	613.12	3.23
482		63.11	2,754.20	53.94	.85	47.89	2,700.26	39.78
484		146.06	677.82	124.90	.84	5.44	552.92	3.79
484		137.96	3,067.02	2,672.70	19.43	1.35	394.32	2.87
488		1,416.14	30,882.42	2,881.80	2.03	10.72	28,000.62	19.78
495		405.34	11,236.90	127.30	.31	8.83	11,109.60	27.41
497	576	320.00	1,445.00	-47.25	-	-	1,532.25	4.79
501		80.00	248.12	-	-	-	248.12	3.35
508		440.00	866.25	-	-	-	866.25	1.97
513		200.00	835.31	389.20	1.95	62.15	446.11	2.23
514	604	240.00	1,119.94	-75.17	-	-	1,195.11	4.98
516	589	160.00	464.06	-90.00	-	-	554.06	3.46

*President Coolidge's maximum \$157.66.

DEFENDANT DANFORTH'S EXHIBIT C-B.

Tract No.	Acres	Pres. Coal- ledge's Max. Price (offer made)	U.S.N.A. Flange Approval Amount \$	Ratio Offer 1 acre 100%	Excess of offer over Approval Amount \$	Excess Offer 1 acre 100%	Remarks N = Minimum of 1.00 per acre.
838	1,136.14	6,644.11	564.60	.38: 18.11	8,209.51: 6.49	1,136.14	
838-C	38.43	980.78	881.40	6.02: 4.84	749.32: 19.80	881.40	
843-C	607	78.49	917.38	349.80: 4.63	2.65	848.15: 7.83	849.20
844	878.64	5,941.02	3,682.00	11.18: 1.61	2,259.02: 6.88	3,682.00	
845	54.58	881.25	176.80	3.34: 3.03	359.45: 6.99	176.80	
845	607	1,850.32	3,841.20	1,394.48: .75	2.23	1,846.74: 1.00	1,850.32
878	880.00	662.89	195.70	.98: 3.54	497.59: 2.49	880.00	
881	410.2	940.08	-135.34	- : -	1,075.42: 2.68	410.2	
884	400.00	783.74	-34.40	- : -	808.14: 2.02	400.00	
886	1,440.00	3,737.23	881.80	.62: 4.19	2,845.63: 1.78	1,440.00	Offer accepted.
811	109.10	858.70	-20.22	- : -	878.92: 5.47	109.10	
815	132.14	1,164.24	480.08	3.1: 2.30	675.19: 4.44	480.08	
132	52,814.65	575,748.75	349,225.67	6.76: 2.52	556,063.49: 10.57	52,814.65	
142	802.93	14,784.02	4,771.80	5.94: 3.10	10,012.20: 12.47	802.93	
151	680.00	8,580.00	875.40	1.29: 9.60	7,704.60: 11.33	680.00	
185	680.00	7,084.69	2,222.10	3.27: 3.19	4,862.59: 7.15	680.00	
209	625.71	10,766.25	1,663.60	2.66: 6.47	9,102.65: 14.55	625.71	
334	180.00	3,314.13	1,263.55	7.02: 1.83	1,050.58: 5.84	180.00	
355	217.73	4,808.10	2,805.65	12.88: 1.71	2,002.45: 9.20	217.73	
138	56,001.00	974,085.95	381,831.77	6.82: 2.55	592,818.76: 10.57	56,001.00	

Tracts of the low (mud) land lying within one half mile of upper full stage section of front line levee.

Tract No.	Acres	Flowers	Full Value	Full	Value (resident's ex. for fee simple title)	Value (resident's ex. for fee simple title)	Value (resident's ex. for fee simple title)	Value (resident's ex. for fee simple title)	Value (resident's ex. for fee simple title)
2-7	20.32	1,924.20	1,924.20	1,924.20	2,070.00	645.80	*1,924.20	1,924.20	
3-4-7	79.15	2,923.40	2,923.40	2,923.40	7,222.00	2,405.00	*2,923.40	2,923.40	
6-7	24.72	917.00	1,361.20	1,361.20	2,256.00	744.80	917.00	1,361.20	
7-7	179.06	6,457.40	9,026.20	9,026.20	15,006.00	4,551.80	*6,457.40	9,026.20	
8-7	59.36	3,206.00	4,642.70	4,642.70	5,970.00	1,361.30	*3,206.00	4,642.70	
10-7	192.02	7,944.40	13,770.20	13,770.20	15,700.00	5,911.00	*7,944.40	13,770.20	
10-7	.25	297.20	297.20	297.20	32.00	10.20	297.20	297.20	
12-7	1,024.72	21,267.20	34,970.22	34,970.22	67,223.00	22,400.40	21,267.20	34,970.22	
13-7	103.21	2,764.00	4,514.40	4,514.40	8,100.00	2,672.00	2,764.00	4,514.40	
14-7	107.97	2,300.00	4,244.20	4,244.20	11,000.00	3,670.00	2,300.00	4,244.20	
15-7	69.38	1,908.00	2,732.20	2,732.20	3,600.00	1,268.00	1,908.00	2,732.20	
16-7	46.99	823.40	1,672.20	1,672.20	4,800.00	1,384.00	1,672.20	1,672.20	
16-7	.25	6.40	11.20	11.20	32.00	10.20	6.40	11.20	
18-7	153.18	1,803.40	2,336.37	2,336.37	11,600.00	3,262.00	1,803.40	2,336.37	
19-7	62.29	825.00	1,341.60	1,341.60	6,000.00	1,380.00	1,341.60	1,341.60	
19-7	14.39	69.40	113.12	113.12	1,150.00	379.20	69.40	113.12	
19-7	77.84	1,022.20	1,623.12	1,623.12	3,200.00	1,024.00	1,022.20	1,623.12	
19-7	80.24	153.20	302.40	302.40	3,100.00	1,022.00	1,022.00	1,022.00	
100-7	408.07	8,900.40	10,547.40	10,547.40	9,800.00	3,224.00	8,900.40	10,547.40	
141-7	328.01	10,212.40	14,346.20	14,346.20	17,000.00	5,612.00	10,212.40	14,346.20	
141-7	20.00	38.00	120.00	120.00	80.00	24.00	38.00	120.00	
142-7	252.16	16,232.20	12,300.40	12,300.40	23,200.00	7,264.00	*16,232.20	12,300.40	
144-7	100.00	3,546.20	4,120.00	4,120.00	4,200.00	1,286.00	3,546.20	4,120.00	
144-7	20.00	1,302.00	1,400.00	1,400.00	900.00	227.00	*1,302.00	1,400.00	
144-7	119.49	2,295.00	4,017.24	4,017.24	4,200.00	1,282.00	2,295.00	4,017.24	
144-7	14.21	621.40	701.20	701.20	320.00	224.00	621.40	701.20	
144-7	89.00	4,971.20	5,822.00	5,822.00	4,000.00	1,224.00	4,971.20	5,822.00	
144-7	40.00	2,019.00	2,500.00	2,500.00	2,100.00	622.00	2,019.00	2,500.00	
144-7	2.27	121.20	205.20	205.20	120.00	42.00	121.20	205.20	
144-7	15,772.12	121,222.20	154,342.20	154,342.20	227,000.00	79,212.24	121,222.20	154,342.20	

*Flowers after receipt.

U. S. Engineer Office, Memphis, Tennessee, March 23, 1932.

DEFENDANT DANFORTH'S EXHIBIT C-10.7

258 On Redirect Examination General Markham testified that he had never seen the letter dated January 14, 1932, marked Defendant Danforth's Exhibit E, and that he was wholly unfamiliar with this form of letter, never having seen such a form before.

Q. Now, if that form of letter was sent to land owners, would you still say that that is a confidential interdepartmental communication, or does that contain the substance of the exhibits marked "A" and "B"?

Mr. Lawrence: That is objected to as incompetent and irrelevant and not tending to prove any issue in the case and as calling for a conclusion of the witness.

A. It would appear to be the next logical step following the authorizations contained in the exhibits to which you referred.

Mr. London: And would that carry out the substance of the authorization or command which was issued?

Mr. Lawrence: That is objected to as calling for a conclusion of the witness and incompetent.

A. It is my understanding that it would carry out the directives of the prior exhibits.

Mr. London: General, would you designate that as an authorization or as a military command?

Mr. Lawrence: The same objection.

Q. (Continued) I am now referring to Exhibits A and B, in which Major Somervell was either commanded or authorized to make these offers to land owners.

Mr. Lawrence: Further objected to as not being the best evidence, the instruments themselves being in evidence, and the question calling for the conclusion of the witness upon the exhibits involved.

A. I would regard the prior exhibits as being directive upon Major Brehon Somervell, whose action under such directive is typified by this letter of January 14, 1932.

Mr. London: Would you say that that letter of January 14, 1932, carried out the instructions or commands issued to Major Somervell?

259 Mr. Lawrence: The same objection.

A. I would.

Mr. London: Would you say that Major Somervell had authority to write that letter, in view of the communications which were passed on down to him from the Chief of Engineers, marked Defendant Danforth's Exhibits A and B?

Mr. Lawrence: That is objected to as calling for the conclusion of the witness not only as to questions of fact and as to interpretations of instruments but as to statutory authority, and as wholly incompetent and inadmissible.

A. I would say that he had complete authority to issue the letter of January 14th.

Mr. London: Now I offer the deposition of Patrick J. Hurley.

Mr. Dyott: Same objection.

The Court: Same ruling.

Mr. Dyott: Exception.

PATRICK J. HURLEY testified that he had been Secretary of War of the United States; that his appointment was confirmed by the Senate on December 9, 1929, and, as he recalled, he took the oath of office that same day; that he served until March 4, 1933, continuously; that as Secretary of War, the Corps of Engineers of the United States Army would be under his jurisdiction, and it was in 1931. He knew Major General Lytle Brown, who in 1931 was Chief of the Corps of Engineers of the United States Army, and he was under witness's jurisdiction in 1931.

Witness was shown a memorandum marked Defendant Danforth's Exhibit B, to which was attached a press release, marked B-2, and testified the request was made by General Brown and was approved by witness as Secretary of War No-

ember 25, 1931. Witness had no knowledge of the press release which was attached.

260 Witness testified that he knew Major Brehon Somervell, and knew him in 1931. He was a Major in the Corps of Engineers of the United States Army; that he thought he was in charge of the work at the New Madrid Spillway in Missouri.

On Cross-Examination witness testified that he had no understanding in connection with the press release referred to; that it was not issued by him; that it (the press release) was not published at his request.

The attention of the witness was called to the second page of Exhibit C. He identified the photostat of his signature. The word "Approved" preceding his signature indicates that he approved the withdrawal of 138 offers—

Mr. London (Interposing) Pardon me just a minute. I want to [pose] an objection to that question on the ground that the document speaks for itself. It is incompetent, irrelevant, and immaterial to any issue in this case and these steps were taken long after the offer had been accepted by the defendant Danforth.

A. (Continued) "I approved the withdrawal of 138 offers made for flowage rights in the New Madrid spillway. 113 of the offers had not been accepted. 25 of the offers had been accepted. I withdrew all the offers because they had been made on a mistake of fact and in a manner detrimental to the Government."

Mr. London: I move that that be stricken out as a conclusion of the witness and as a voluntary statement not called for by the question.

Mr. Lawrence: Q. I understand, General, you mean, then, that the withdrawal referred to by you was authorized and directed by you as Secretary of War of the United States.

Mr. London: Objected to as incompetent, irrelevant and immaterial to any issue in the case.

A. Yes, sir.

Mr. Lawrence: I offer Exhibit C as a part of the cross-examination of Mr. Hurley.

261 Mr. London: Objected to as not covered in direct examination and as not part of the defendant Danforth's case.

Mr. London: And I offer Major Brehon Somervell's deposition.

Mr. Dyott: Same objection.

The Court: Same ruling.

Exception.

MAJOR BREHON SOMERVELL testified that he lived in Washington, D. C., that he was a major in the United States Army, connected with the Engineering Department; that since his graduation from the Military Academy he has always been in the Engineering Department. In 1931 he was stationed at Memphis, Tennessee, and was there in 1932. While stationed at Memphis, Tennessee, he was District Engineer of the Engineer Corps, and had charge of all work falling within the Engineering Department, subject to the supervision of his superior officers, in an area known as the Memphis District. That included the Bird's Point and New Madrid Area. He was connected with the flowage project, and had charge of the work there. He knew Major General Lytle Brown, and knew him at that time. He was the chief of the witness. Witness took instructions from him. The position of Lytle Brown in the Army was Major General, Chief of Engineers.

Witness was familiar with the work that was done by the Engineers and by the Department of Agriculture in the Bird's Point New Madrid area. The engineers made independent appraisals of the land themselves. They hired local men to make appraisals. They secured the co-operation of the Department of Agriculture to make appraisals of the land and flowage rights in the New Madrid floodway. So that they made, really, three separate appraisals of that land. Those appraisals were all made prior to the time that they made offers to the land owners. Witness was in charge of the appraisals made by the Engineers, and he made an appraisal of tract 243. Two of the appraisals were made by the
262 same organization, that is, they looked the land over and figured out about what it was worth, and then they hired individuals up there to make reports to them on the same pieces. The Court also appointed appraisers at times on different cases. The individuals who made the appraisals were in addition to appraisers appointed by the Court. Sometimes they may have been the same men. On the other hand, they were appointed independently, the ones witness referred to. So that they had the private individuals who

de the appraisals for the Engineering Department, they
l the individuals who made the appraisals for the Depart-
nt of Agriculture, and they had the appraisers appointed
the Court. This was true of the tract in question as it
s true of every tract.

The witness was at the time the head of the field organiza-
n. The President of the Mississippi River Commission
s Brigadier General Thomas H. Jackson. He was the im-
diate chief of witness, and witness received instructions
ough him. Witness would receive these instructions from
chief generally in writing, through the President of the
ssissippi River Commission, and they would come down
him through indorsements in military fashion. As far as
e witness knew he was the only person designated to make
ers to land owners.

Witness identified the signature of Lytle Brown on a me-
randum dated November 17, 1931, marked Defendant Dan-
th's Exhibit B-1, followed by a press release, marked B-2.

Witness was shown six pages marked Defendant Danforth's
hibit A, pages A-1 to A-6, inclusive, and identified that as
photostatic copy of communications passing between the
ief of Engineers and the office of witness, via channels. That
s the document or the authority upon which he made these
ers to the land owners. The witness then quoted from
e document as follows:

"It is believed that the Department should not agree prior
Court action to any figure greater than that determined
the corps of experts furnished by the Department of Agri-
culture and I so recommend."

3 This was from the third page, marked "Ex. A 3.",
dated December 15, 1931, which was prior to the time
at he sent out these offers.

The witness was asked if he learned of any irregularities
connection with the offer on the Danforth tract. He stated
at it was not an irregularity; that it was a mistake; that
regarded it as excessive; that he withdrew the offer on
structions; that the only reason that he recommended with-
drawing the offer was that he thought it was too much;
at he thought the offer had already been accepted on the
act.

Witness was shown a letter, dated November 16, 1932, marked Defendant Danforth's Exhibit D and stated the signature of Edwin C. Kelton looked like that of Edwin C. Kelton; that Kelton was in Washington; that at the time in question Kelton was the assistant of the witness; that the letter was signed "For and in the absence of the District Engineer," and the witness presumed that he was absent, that Kelton had general authority to sign it in the absence of the witness; that he was the principal assistant of the witness.

The letter of November 16, 1932, Defendant Danforth's Exhibit D, was offered in evidence, and is in words and figures as follows, to-wit:

Defendant Danforth's Exhibit D

Address Reply to
District Engineer War Department
U. S. Engineer Office U. S. Engineer Office
P. O. Box 97 P. O. Box 97
Memphis, Tenn. Memphis, Tenn. November 16, 1932

Refer to File No.

Subject: Tracts 187, 243, 281, and 327 — Flowage — New
Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

DEAR Sir:

I have your letter dated November 9, 1932, with further reference to the above tracts of the New Madrid Floodway.

The status of tracts 187, 243, 281 and 327 is still the same as previously set out in my letters to you, dated April 22, 1932, and subsequently.

It is planned to institute friendly condemnation proceedings in the case of tracts 187 and 327 and regular condemnation proceedings in the case of tracts 243 and 281.

For and in the absence of the District Engineer.

Very truly yours,

EDWIN C. KELTON,
Major, Corps of Engineers,
Assistant.

No. 716 Law, Tracts 243 and 281
United States of America, Plaintiff,

vs.

Beatrice McDaniel Et Al., Defendants.

Defendant Danforth's Exhibit D

(Signed) Paul J. Robertson
Notary Public in and for
the District of Columbia.

(Notarial Seal)

(Stamped on back of Exhibit
with rubber stamp)

Filed Sep 21 1934
Jas. J. O'Connor,
Clerk.

Counsel for the plaintiff made the same objections to the admission of Exhibit D as were made to the admission of Defendant Danforth's Exhibits A, B, and C, which objections were repeated in full.

265 In making these offers the witness based the offers upon the maximum set out in President Coolidge's order; that would be two-thirds, as witness remembered it, of the assessed valuation. This was the maximum price authorized. The witness was referring to Defendant Danforth's Exhibit A-6, a schedule, for making flowage offers approved by the Chief of Engineers, and it does not give the maximum price authorized by President Coolidge. At the time the witness made these offers, he already had all the data available regarding the tracts of land with reference to the appraisals.

Witness was shown a letter, dated January 14, 1932, marked Defendant Danforth's Exhibit E, and testified that it appeared to be in the form of the letters that were sent out, but did not have his signature on it. It had a type-written signature. It was his practice to send an original which was signed by him, and also a duplicate original, not signed by him, for the owner to keep. The witness would request the owner to sign and return the original, which was signed by the witness.

Mr. London (after discussion off the record): The plaintiff will stipulate that the offer with reference to Tract No. 281, in the sum of \$2,208.94, was sent to the defendant

Danforth in the same form as the offer which has been marked Defendant Danforth's Exhibit E, dated January 14, 1932, and was sent at about the same time.

Mr. Lawrence: That is all right.

Mr. London: I think it was exactly the same date, as a matter of fact.

Mr. Lawrence: Yes.

Defendant Danforth's Exhibit E, together with diagrams attached thereto, were offered in evidence, marked Defendant Danforth's Exhibit E, which are as follows:

Copy

DEFENDANT DANFORTH'S EXHIBIT E.
Sheets E-1, E-2 and E-3.ADDRESS REPLY TO
DISTRICT ENGINEER
U. S. ENGINEER OFFICE
1006 MCCALL BUILDING
MEMPHIS, TENN.WAR DEPARTMENT
U. S. ENGINEER OFFICE
1006 MCCALL BUILDING
MEMPHIS, TENN.

REFER TO FILE NO

JAN 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o. Pufina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100 - - - Dollars (\$ 31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 243, as indicated on the inclosed plat, (this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

Incls. -

Tract map;
General map of floodway;
Addressed return envelope.Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

268 Counsel for the plaintiff made the same objections to the admission of Exhibit E as were made to Defendant Danforth's Exhibits A, B, and C, which objections were repeated in full.

269 The witness testified to another letter, marked Defendant Danforth's Exhibit F, which was an offer made in exactly the same way, dated January 14, 1932, on Tract 187, and also to an offer made on Tract No. 281, neither tract being involved in this appeal, but which were offered for the purpose of showing that the offers were all made in the same way.

Witness was shown a letter dated February 8, 1932, to which were attached diagrams, covering Tracts 325 and 327, marked Defendant Danforth's Exhibit G, and identified his signature on the offer. These have to do with other tracts, but were offered for the purpose of showing that the same method of procedure was used by the defendant, and are not attached here in order to shorten the record. Counsel for plaintiff objected to Exhibits F and G, on the ground that they were immaterial.

Witness was shown a letter dated February 8, 1932, marked Defendant Danforth's Exhibit H, and identified it as the form on which the witness made offers. It was on the form as the duplicate original on which his typewritten signature appeared.

Witness identified letter dated April 25, 1932, marked Defendant Danforth's Exhibit I, which letter also showed the acceptance of the offer for Tract No. 327. The letter of February 8, 1932, Exhibit H, referred to the same tract No. 327.

Defendant Danforth's Exhibits H and I were offered in evidence, counsel for the plaintiff objecting on the ground that they were immaterial, and are as follows:

Defendant Danforth's Exhibit H

The form of Defendant Danforth's Exhibit H was exactly the same as Defendant Danforth's Exhibit E, the only difference being that the amount of the offer was \$1,058.06, and the tract was #327. The acceptance on Defendant Danforth's Exhibit H was in exactly the same form as in Defendant Danforth's Exhibit E. The date of acceptance was also, March 2, 1932.

270

Defendant Danforth's Exhibit I.

Address Reply to War Department
District Engineer U. S. Engineer Office
U. S. Engineer Office P. O. Box 97
P. O. Box 97 Memphis, Tenn.
Memphis, Tenn.

April 23, 1932

Reply to File No.....

Subject: Tract No. 327—Flowage—New Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Purina Mills,
St. Louis, Missouri.

Your acceptance of the offer of One thousand fifty eight and 06/100 dollars (\$1,058.06) dated Feb. 8, 1932, made by this office for a flowage easement over Tract No. 327 of the New Madrid Floodway, was received March 3, 1932.

You are advised that the Assistant to the United States Attorney, Mr. John C. Dyott, Room 211 Customhouse, St. Louis, Missouri, who is handling all legal matters for the United States in connection with the New Madrid Floodway, will be informed of the status of this case and requested to expedite as much as possible final judgment for the above amount in the friendly condemnation suit to be filed involving this case.

Very truly yours,

BREHON, SOMERVELL,
Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,
vs.
Beatrice McDaniel et al., defendants.

Defendant Danforth's Exhibit I.

(Signed) Paul J. Robertson
Notary Public in and for
the District of Columbia.

(Notarial Seal)

Witness identified Defendant Danforth's Exhibit J, a letter dated April 25, 1932. This was offered in evidence, and is in words and figures as follows:

271 Defendant Danforth's Exhibit J.

Address Reply to War Department
District Engineer U. S. Engineer Office
U. S. Engineer Office P. O. Box 97
P. O. Box 97 Memphis, Tenn.
Memphis, Tenn.

April 25, 1932

Refer to File No.

Subject: Tract No. 187—Flowage—New Madrid Floodway.

To: Mr. Wm. Danforth,
c/o Purina Mills,
St. Louis, Missouri.

Your acceptance of the offer of One thousand nine hundred eighty and No/100 dollars (\$1,980.00) dated Jan. 14, 1932, made by this office for a flowage easement over Tract No. 187 of the New Madrid Floodway, was received March 3, 1932.

You are advised that the Assistant to the United States Attorney, Mr. John C. Dyott, Room 211 Customhouse, St. Louis, Missouri, who is handling all legal matters for the United States in connection with the New Madrid Floodway, will be informed of the status of this case and requested to expedite as much as possible final judgment for the above amount in the friendly condemnation suit to be filed involving this case.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,

vs.

Beatrice McDaniel et al., defendants.

Defendant Danforth's Exhibit J.

(Signed) Paul J. Robertson
Notary Public in and for
the District of Columbia.

"Counsel for the plaintiff objected to the admission of Exhibit J, on the ground that it was immaterial.

272 • Witness identified his signature on Defendant Danforth's Exhibit K, letter dated February 11, 1932, in which he extended the time limit for the acceptance of offers to March 15, 1932. This letter was offered in evidence as Defendant's Exhibit K, and is in words and figures as follows, to-wit:



DEFENDANT DANFORTH'S EXHIBIT K.

ADDRESS ONLY TO
DISTRICT ENGINEER
U. S. ENGINEER OFFICE
1000 MC CALL BUILDING
MEMPHIS, TENN.

WAR DEPARTMENT
U. S. ENGINEER OFFICE
1000 MC CALL BUILDING
MEMPHIS, TENN.

February 11, 1932.

REFER TO FILE NO.

Subject: Tract 187, 243, 281, 325 and 327 - Flowage - New Madrid Floodway.

To: Mr. T. R. Roe,
c/o Ralston Purina Co., Inc.,
835 South Eighth St.,
St. Louis, Mo.

Dear Sir:

In compliance with your request, dated February 9, 1932, on behalf of Mr. Wm. H. Danforth and for the reasons stated by you, I am glad to extend the time limit for the acceptance of offers made in connection with the above tracts of the New Madrid Floodway to March 15, 1932.

Very truly yours,

Frederick Schervell
Frederick Schervell,
Major, Corps of Engineers,
District Engineer

c.c. to 1st Area.

No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,
v.
Beatrice McDaniel et al., defendants.

DEFENDANT DANFORTH'S EXHIBIT K.

Paul H. Robertson
Notary Public in and for
the District of Columbia

274 Counsel for the plaintiff made the same objections to the admission of Exhibit K as were made to Defendant Danforth's Exhibits A, B, and C.

275 Witness identified letter dated April 26, 1932, marked Defendant Danforth's Exhibit L, and stated that it had his signature on there. This was offered in evidence as Defendant Danforth's Exhibit L, and is in words and figures as follows, to-wit:

Defendant Danforth's Exhibit L.

Address Reply to
District Engineer
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

War Department
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

April 26, 1932.

Refer to File No.

Subject: Tracts 187, 243, 281, 325 and 327—Flowage—New Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Ralston Purina Company,
Checkerboard Square,
St. Louis, Missouri.

Dear Sir:

In reply to your letters of March 2, 12 and April 22, 1932, in regard to tracts 187, 243, 281, 325 and 327, of the New Madrid Floodway, you are referred to my letters of April 22 and 25, 1932, concerning the status of the flowage offers made in connection with these tracts.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

No. 716 Law

Tracts 243 and 281

United States of America, plaintiff,

vs.

Beatrice McDaniel, et al., Defendants.

Defendant Danforth's Exhibit L.

(Signed) Paul J. Robertson
Notary Public in and for
the District of Columbia.

(Notarial Seal)

(Stamped on back of Exhibit
with rubber stamp)

Filed Sep. 21, 1934.

Jas. J. O'Connor,
Clerk.

Counsel for the plaintiff made the same objections to the admission of Exhibit L as were made to Defendant Danforth's Exhibits A, B, and C.

276 The witness identified his signature on Defendant Danforth's Exhibit M, a letter dated November 7, 1932. This was offered in evidence as Defendant Danforth's Exhibit M, and is in words and figures as follows, to-wit:

Defendant Danforth's Exhibit M.

Address Reply to
District Engineer
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

War Department
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

November 7, 1932.

Refer to File No.....

Subject: Tracts 187, 243, 281, 325, and 327—Flowage—New Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

Dear Sir:

I have your letter, dated November 1, 1932, requesting information as to the status of the above cases.

Suit 604 covering tract 325, was filed in January, 1932, and should come up for final settlement in the special term of Federal Court at Cape Girardeau, Mo., about January 16, 1933.

On account of the great number of suits being filed and handled in Court by the U. S. Attorney, it may be several months before it will be possible for him to file suits covering the other tracts mentioned above.

Very truly yours,

BREHON SOMERVEJ L,
Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,

vs.

Beatrice McDaniel, et al., defendants.

Defendant Danforth's Exhibit M.

(Signed) Paul J. Robertson

Notary Public in and for
the District of Columbia.

(Notarial Seal)

Stamped on back of Exhibit with rubber stamp)

Filed Sep. 21 1934.

Jas. J. O'Connor, Clerk.

The witness was asked by Mr. London:

Q. Major Somervell, is it not a fact that when some of these offers were accepted, that they were paid?

A. No, sir; none of them were paid. These offers were offers to recommend a certain sum to the Court for action. The office, our office and our Department, had no authority to pay anything without the action of the Court.

Mr. London: I ask that that answer be stricken out as not responsive to the question.

Q. Is it not a fact, Major Somervell, that in many of these cases where the offers were accepted that judgments were entered up on the amounts agreed upon and were paid?

Mr. Lawrence: That is objected to as immaterial and calling for a conclusion of the witness, not evidence in this case, and not within the knowledge of the witness to testify, as to court proceedings in other cases.

A. I can not remember any individual judgments entered by the Court.

277 The witness was asked by Mr. London:

Q. Now, in this communication of November 30, 1931, marked Defendant Danforth's Exhibit A-1, it was set forth:

"The status of titles in the floodway is such that the offers and acceptances are equivalent to a request to the Court for an agreed verdict awarding the sums offered."

You knew that at the time you made these offers, did you not?

A. That is the statement by General Pillsbury; I am not sure it was correct.

Q. And he was your chief at the time? A. Yes, sir.

The originals of these offers were to have been returned to witness and he put them in a file. The records of the assessments on the tracts prior to the time he made offers were investigated by someone in the office of the witness, under the supervision of the witness. The offers that he made on the tract in question did not exceed the maximum prescribed by President Coolidge, so when the witness referred to a mistake he did not mean that there was a mistake in that respect. He was within the maximum.

The witness identified a letter dated April 15, 1932, which was marked, in the case of the United States vs. Frances-Ralph Realty Company, No. 584, Tract No. 94, as Defendant's Exhibit C, and identified his signature. This was marked Defendant's Danforth's Exhibit X, and was offered in evidence, counsel for the plaintiff objecting on the ground that it was immaterial and incompetent, and not tending to prove any issue in the case, and is in words and figures as follows, to-wit:

278 Defendant Danforth's Exhibit X.

Address reply to
District Engineer
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

War Department
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

April 15, 1932.

Subject: Suit No. 584, Tract No. 94—Flowage—New Madrid Floodway.

To: Francis-Ralph Realty Co.,
c/o R. E. Neidringhaus,
933 Arcade Bldg.,
St. Louis, Mo.

Gentlemen:

Your acceptance of the offer of four thousand one hundred sixty six and 20/100 dollars (\$4,166.20), dated Jan. 8, 1932, made by this office for a flowage easement over Tract No. 94 of the New Madrid Floodway, was received March 19, 1932.

You are advised that the Assistant to the United States Attorney, Mr. John C. Dyott, Room 211 Customhouse, St. Louis, Mo., who is handling all legal matters for the United States in connection with the New Madrid Floodway, will be informed of the status of this case and requested to expedite

as much as possible final judgment for the above amount in the friendly condemnation suit (584) involving this tract which has already been filed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, Plaintiff,

vs.

Beatrice McDaniel, et al., Defendants.

Defendant Danforth's Exhibit X.

(Signed) PAUL J. ROBERTSON,
Notary Public in and for
the District of Columbia.

(Notarial Seal)

Defendant Danforth offered the letter dated January 8, 1932, with the typewritten signature of Brehon Somervell, concerning which the witness testified that he made the offer shown in the Exhibit because his signature is shown on Defendant Danforth's Exhibit X acknowledging an acceptance of \$4,166.20. Said exhibit is as follows:

279 Defendant Danforth's Exhibit Y.

Address Reply to	War Department
District Engineer	U. S. Engineer Office
U. S. Engineer Office	1006 McCall Building
1006 McCall Building	Memphis, Tenn.
Memphis, Tenn.	

Jan. 8, 1932.

Refer to File No.....

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Francis-Ralph Realty Co.,
933 Arcade Bldg.,
St. Louis, Mo.

I. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture,

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where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Four thousand one hundred sixty-six and 20/100 .. Dollars (\$4,166.20) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 94, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization:

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

Incls.—

Tract map;
General map of floodway;
Addressed return envelope.

Accepted:

FRANCIS-RALPH REALTY
COMPANY,

(Owner) By (Signed)
R. E. Niedringhaus,

933 Arcade Building, St. Louis, Mo.,
(Address)

March 18, 1932.
(Date)

No. 716 Law

Tracts 243 and 281

United States of America, Plaintiff,

vs.

Beatrice McDaniel, et al., Defendant.

280 Defendant Danforth's Exhibit Y.

(Signed) PAUL J. ROBERTSON,
Notary Public in and for
the District of Columbia.

(Notarial Seal)

The witness identified his signature on a letter dated April 25, 1932, marked Defendant Danforth's Exhibit Z. This letter was offered in evidence, and is in words and figures as follows:

281 Defendant Danforth's Exhibit Z.

Address Reply to
District Engineer
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

War Department
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

April 25, 1932.

Refer to File No.....

Subject: Suit No. 604, Tract No. 325—Flowage—New Madrid
Floodway.

To: Mr. Wm. H. Danforth,
c/o Ralston Purina Co., Inc.,
St. Louis, Mo.

Your acceptance of the offer of Three thousand sixty nine and 80/100 dollars (\$3,069.80), dated Feb. 8, 1932, made by this office for a flowage easement over Tract No. 325 of the New Madrid Floodway, was received March 3, 1932.

You are advised that the Assistant to the United States Attorney, Mr. John C. Dyott, Room 211 Custom house, St. Louis, Mo., who is handling all legal matters for the United States in connection with the New Madrid Floodway, will be informed of the status of this case and requested to expedite as much as possible final judgment for the above amount in

the friendly condemnation suit (604) involving this tract which has already been filed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, Plaintiff,
vs.
Beatrice McDaniel, et al., Defendant.
Defendant Danforth's Exhibit Z.

(Signed) PAUL J. ROBERTSON,
Notary Public in and for
the District of Columbia.

(Notarial Seal)

Counsel for the plaintiff objected to the admission of Defendant Danforth's Exhibit Y, on the ground that it was immaterial and incompetent, and not tending to prove any issue in the case. Counsel for the plaintiff made the same objections to the admission of Defendant Danforth's Exhibit Z as were made to Defendant's Exhibits A, B, and C.

282 Witness identified his signature on letter dated February 8, 1932, marked Defendant Danforth's Exhibit AA. This letter was offered in evidence. It is not reproduced here because it is an exact copy of Defendant Danforth's Exhibit E, except that the amount is \$3,069.80, and the tract referred to is #325. It was accepted under date of March 2, 1932, by William H. Danforth, and the offer was made by Brehon Somervell in exactly the same form, and signed by Brehon Somervell, Major, Corps of Engineers, District Engineer. Counsel for the plaintiff made the same objection to the admission of this exhibit as were made to Exhibits A, B, and C.

The attention of the witness was called to an exhibit which had been marked Defendant Danforth's Exhibit A, sheets A-1 to A-5, and he was asked if that was not sent down to him in the usual course of military practice. He testified that it was civil work and the papers were forwarded to him through the usual channels used by the Engineer Department on river and harbor and flood control work. The witness testified, after objection by counsel for plaintiff, on the ground that it was immaterial and irrelevant, that he did not know whether

a failure to carry out those instructions would have subjected him to military court martial, but he testified that it would have constituted a failure to obey a military command.

Witness further testified in his 6th indorsement, on Defendant Danforth's Exhibit A-5, paragraph 2, he stated that:

"On about February 15, 1932, or 30 days after offers were made, a report as to acceptance received will be submitted."

He testified that he submitted such a report; that the report is not set out in this letter of April 4, 1932, which has been identified as Defendant Danforth's Exhibit C. He did not recall the nature of his report. His report would be a list and be carried by a letter of transmittal, which would be signed. The report would contain a statement of the status of the acceptance of the offers, that is, individual accept-
283 ances. He did not remember how many pages it contained. It was not a long report; it was a tabulation, probably, of the five hundred odd tracts. He did not know whether it was the tabulation identified as Defendant Danforth's Exhibit C, sheets C-5 to C-10. This was apparently a tabulation showing President Coolidge's maximum price, with the appraisal made by the United States Department of Agriculture, and the excess of the offer made according to President Coolidge's maximum over the appraisal, and the amount of the sum recommended to be offered.

The witness further testified that he had all the information contained in this tabulation, marked Defendant Danforth's Exhibits C-5 to C-10, inclusive, prior to the time he made this offer on Tract 243. Whenever the witness made these offers they were all typewritten and filled in with the amounts that he would offer on the particular tracts, and to that letter or offer would be attached a plat or diagram showing the plat involved.

Q. And in this procedure you did not write any additional letters to any of those land owners, telling them that you had any limited authority?

A. It is contained in the letter itself.

Q. "in the letter itself"—and that is all you ever wrote of your authority, isn't it? A. As far as I know.

Q. Take, for example, Defendant Danforth's Exhibit E, where you set out that:

"The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either

at the maximum rates authorized by order of President Coolidge, December 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned."

A. Yes, sir.

Q. You would apply the higher of the two, would you not?

A. Yes, sir.

Q. So that when you made this offer for Tract No. 284 243 of \$31,681.98, you made the higher of the two offers, that is, the two-thirds of the assessed value, as set out in the executive order of President Coolidge, or the appraisals made by the Department of Agriculture, did you not?

A. Wherever the maximum set up by President Coolidge was in excess of the appraisal of the Department of Agriculture, we fixed the figure as President Coolidge's maximum.

Q. And in this particular case you fixed the figure as the maximum as authorized by President Coolidge?

A. I think so; yes, sir.

Q. At the time when you made this offer of \$31,681.98, you knew that the figure as fixed by the Department of Agriculture was considerably less than two-thirds of the assessed value under the Coolidge proclamation, did you not?

A. Yes, sir. I also stated that:

"Payment can not be made without court action as title can not be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses."

Q. Yes, sir; and you said that an agreed verdict was to be awarded in the amount of this offer if the offer was accepted.

A. I said "requested." I could not say, very well say, "awarded." That I could not do.

Q. Yes, "request that an agreed verdict be awarded in the amount of this offer." And that statement was based upon paragraph 2. of Defendant Danforth's Exhibit A, page A-1, wherein General Pillsbury set out that:

"The status of titles in the floodway is such that the offers and acceptances are equivalent to a request to the court for an agreed verdict awarding the sums offered."

Was it not based on that?

A. It may have been.

On Cross-Examination witness testified:

285 Q. Major, making that a little more definite, what did you mean by "request of the court"?

A. We had no authority to pay any money for the acquisition of these lands without court action.

Mr. London: I object to that as calling for the conclusion of the witness and ask that the answer be stricken out as not being responsive to the question and as being the construction of the witness of a written document.

By Mr. Lawrence:

Q. And there was in contemplation all of the time that these offers were made that a further act was to be performed before the matter would be completed?

Mr. London: I object to the question, as incompetent, irrelevant and immaterial and as calling for the conclusion of the witness and calling for the construction of a written document and calling for a construction of the law.

A. Yes.

Q. You did not assume, Major, to determine the Court's judgment in the matter as to the sum of compensation to be paid?

Mr. London: The same objection.

A. No, sir. The Court at times awarded less than was agreeable to the parties.

Mr. London: I ask that that be stricken, as not responsive to the question and as having no bearing upon the case. May I ask a question at this point?

Mr. Lawrence: Yes.

By Mr. London:

Q. You say that the Court at times awarded less than was agreeable to the parties. Do you mean that upon some of these offers and acceptances the court awarded less?

A. Yes.

Q. Can you mention any case where the Court did it?
286 A. I can not mention the name of it, but, as I remember it, there was a tract down in the back water where our office thought a dollar an acre was a fair value and the Court awarded seventy-five cents.

Witness further testified that he thought it was on one of these offers and acceptances; that his offer was withdrawn prior to action by the Court. So far as he knew there was no judgment on the offers in the two cases that he made to Danforth.

By Mr. Lawrence:

Q. As the author of Defendant Danforth's Exhibit F, identified as having been transmitted by you to the defendant, will you interpret this clause:

"3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer."

Mr. London: I object to that as calling upon the witness to interpret the contents of the letter, calling for a construction of it, and calling for the conclusion of the witness.

A. I am not entirely familiar with the details except to this extent: if the offer was accepted we notified the special assistant to the district attorney that the price of such and such an amount was agreeable to both parties, and to request a verdict from the Court on that basis.

Mr. London: I ask that the answer be stricken out for the reasons heretofore given.

By Mr. Lawrence:

Q. I call your attention to Defendant Danforth's Exhibit N, Major. Was that in furtherance of the plan of making a request to the Court and following the request with further consideration?

287 Mr. London: I object to the question as calling for the construction of this letter and calling for the conclusion of the witness, and, furthermore, I object on the ground that it is incompetent, irrelevant, and immaterial to any issue in this case; and it was made long after the acceptance in this case.

A. This letter is apparently written by me and signed in my name, and the answer is "yes".

By Mr. Lawrence:

Q. Major, is that Exhibit N a part of the transaction in this case?

288 Mr. London: I object to that on the ground that it is leading and suggestive and not a part of the direct examination and calls for the conclusion of the witness.

A. Yes.

By Mr. Lawrence:

Q. And Exhibit N was transmitted by you in the ordinary course to the land owners to whom this so-called offer had been made?

Mr. London: The same objection.

A. Yes.

Mr. Lawrence: The paper marked Exhibit N is offered as a part of the cross-examination.

Mr. London: "Objected to as not covered by the direct examination, not relevant and not material, and not proper to be offered as part of the cross-examination.

(The paper so produced and identified and offered in evidence by the plaintiff was filed with the deposition, marked as Defendant Danforth's Exhibit N for identification, as noted at page 44 of the deposition, and also marked as the Plaintiff's Exhibit 2 Somervell.)

The exhibit is in words and figures as follows, to-wit:

Defendant Danforth's Exhibit N.

Address Reply to	War Department
District Engineer	U. S. Engineer Office
U. S. Engineer Office	P. O. Box 97
P. O. Box 97	Memphis, Tenn.
Memphis, Tenn.	

July 8, 1932.

Refer to File No.

Subject: Tracts 243 and 281—Flowage—New Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

Dear Sir:

I have your letter, dated June 24, 1932, in regard to the flowage easements to be condemned by the Government over tracts 243 and 281 of the New Madrid Floodway.

It is regretted that after a careful review of the question of flowage over these tracts it was found that the prices first suggested could not be properly recommended to the Court. It is not feasible for this office to recommend for an agreed verdict prices in excess of what are considered fair and reasonable prices by higher authority. As all flowage cases are to be presented to the Court, this

office is confident that just compensation will be awarded in all cases.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

c. c. to U. S. Attorney
c. c. to 1st Area.

No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,

vs.

Beatrice McDaniel et al., defendants.

Defendant Danforth's Exhibit N for identification.

Plaintiff's Exhibit 2, Somervell.

(Signed) Paul J. Robertson,
Notary Public in and for
the District of Columbia.

(Notarial Seal)

(Stamped on back of Exhibit
with rubber stamp)

Filed Sep. 21, 1934
Jas. J. O'Connor,
Clerk.

Mr. London: I offer all the Exhibits which are attached to these depositions.

Mr. Dyott: The same objection.

The Court: Overrule the objection.

Mr. Dyott: Exception to that.

In offering the depositions and exhibits there is a stipulation with reference to the use of photostatic copies, under which it is stipulated that photostatic copies instead of originals may be used in all the depositions taken in Washington, D. C.

Mr. London: I offer all the Exhibits that are mentioned in the depositions. . . .

I offer the testimony of

ARTHUR W. SWACKER, Loan Agent for the Northwestern Mutual Life Insurance Company, with headquarters at Sikeston, Missouri. He testified that this Company had a loan on the tract in 1928 or 1927, prior to the enactment of this Floodway Act, of approximately fifty dollars per acre in there; that he had not made any loans since the Floodway went into effect in areas within the spillway, although having had applications for them; that they collected their money on this tract; that Edward G. Rollwing made the loan on it; that the land was not foreclosed; that they carried the loan on it at the time Danforth owned it; and it was still on there when he acquired it; that he paid it off; it was paid in full; that four loans, on Sections 22 and 27 were paid in full on April 26, 1925.

Mr. London: Let the record show that by consent there is no payment by the Government of any money paid into Court at this time.

Mr. Dyott: Yes, please let the record show, because there is no final judgment.

Mr. London: If the Court please, I desire to offer the Answer and Counterclaim which was filed in this case and stricken; it was filed by permission of the Court.

G. W. MILLER, Engineer, United States Engineer's Office, Memphis, Tennessee, testified that it was the practice of the Government to enter up judgments, that is, the parties appeared before the Court with the agreement to settle the flowage easement for an agreed amount; that judgments would be entered and the money would be paid.

Q. And the purpose of it was so that the title would be cleared and everybody would be agreed?

Mr. Dyott: That calls for a conclusion of the witness,
291 involving a matter of law in which the witness has not as yet been shown competent to answer.

Mr. London: If Your Honor please, it bears out what is contained in the offer that the Government made in this case, namely, that they were making this offer upon acceptance and they entered up the judgment without the hearing to show.

The Court: I sustain the objection to the question.

Mr. London: Note my exception.

Mr. London: He did testify that he entered judgments in all cases where settlements were made, for the purpose of clearing the title.

Mr. Dyott: I object to it as the witness is not shown to have testified to any such thing.

The Court: I think the offer is broad; I think probably counsel is offering to give testimony by this witness to prove something which couldn't be proved by the witness, and if counsel is going to stand on his objection, we will let the matter ride that way.

Q. I would like to ask you this question: did you receive instructions from your Legal Department to handle it that way?

A. I regulated that for myself.

Q. Do you know whether that was done prior to the time you took charge?

A. I don't think in all cases.

Q. Do you know of any case where you didn't enter judgment where settlement was made?

A. Oh, they entered judgments in all settlements, I think; the normal course of procedure since I have had charge of the cases is to present the formal agreement in the Court Room and we ask for a judgment to that amount.

Q. Why do you do that?

A. Purely to keep our records clear.

Q. What records are you talking about?

A. District records, District Office records.

Q. Was that the only purpose?

292 A. Well, the purpose might have been, too, to show they had authority to ask that judgment be taken, and bid the tract for an agreed amount.

Q. But judgments were entered up in each case, weren't they, without exception?

A. I can only speak for the—

Q. I am talking about the dates you had charge.

A. Yes, sir.

The levee was opened while Major R. D. Burdick was in charge. He is assistant to the present District Engineer at the Memphis District, in the Memphis office. His immediate superior was Colonel Reybold, stationed at Memphis. The set-back levee was completed about the latter part of 1931. The witness was not certain.

G. W. Miller further testified, on behalf of the Government, that the tract in question contained 1033.56 acres including the acreage in roads and ditch easements. The tract

comprises all of sections 22 and 27, lying east of the set-back levee. 27.7 acres or 2.8 per cent lies below elevation 300; 6.3 acres or .7 of one percent lies below elevation 299. There are no lands lower than 296 aside from ditches. Of the whole tract 995.65 acres is above backwater, that is, above 300 elevation. The highest elevation is 309.3. The lowest elevation is 296. The average elevation is 304.3.

L. T. BERTHE, a civil engineer, living at Charleston, Missouri, after testifying to his qualifications, which are admittedly adequate, but are omitted to save space, testified on behalf of defendant Danforth to his experience in the flood area, and stated that he had made a study of flood control as applied to the Mississippi and Ohio Rivers since 1914. He actually saw all of the floods from 1912, like the floods of 1912, 1913, 1916, 1922, 1927, and 1937.

The present height of the riverside levee, he testified, varies somewhere from 10 to 20 feet, and in some places may be as high as 21, 22, or 23 feet. The set-back levee in one or two places had a height of 25 feet, but will vary from 10 to 20 feet, and may have some sections that are somewhat higher. He testified that the Cairo gauge is a graduated measure, such as a rule or yard stick, only it extends along the Ohio bank from the low water to the top of the concrete wall at Cairo, and is marked down there in feet and tenths, so that the surface of the water where it intercepts against the gauge gives the stage. It is located about two miles up the Ohio River from the mouth of the Ohio River. The Cairo gauge is separate from the height of the Riverside Levee.

The height of it is actually the height of the river above the ground surface. Fifty-five feet on the Cairo gauge has nothing to do with the height of the Riverside Levee. It has to do with the height of the water along the Riverside Levee, or against it when the water stands at a given height on the gauge at Cairo as it passes. From an engineer's point of view, it would be possible to construct a river levee that would protect the spillway against floods if Cairo were disregarded. From time to time the Riverside Levee has been increased in height, up to the adoption of the present flood control act in 1928. The Riverside Levee started about 1903. In 1908 they were building it to a grade of 55 feet on the Cairo gauge; that meant that the top of the levee was so fixed that it would be even with the surface of the water as close as that could be determined passing Cairo at 55 feet on the Cairo gauge. Subsequent to the 1912 and 1913 floods, a new grade line was established, that is, grade lines were established by the Mississippi River Commission of the

United States Government called the 14 grade, which raised that grade line to 58 feet on the Cairo gauge. In 1926 the grade line was again raised from Cairo to Columbus, tapering out above Columbus and below Cairo to 59 feet. The actual levee construction along that Riverside Levee was built one foot above those ridges. In other words, they were built with an 8 foot crown. To that grade then an additional foot was added to what was called a bicycle crown, so that a 58 foot grade levee was built with a top adequate to 59 and a 59 foot grade with a top adequate to 60. The levee had not been raised or touched or maintained since 1927 or 1928. It was constructed, all of it with a 58 or 59 foot grade, brought to 58 and part 59 with the foot of topping in addition to that. This was also done by the United States Government under their engineers. From an engineering point of view, 295 it would be possible to construct that to 65 feet on the Cairo gauge and would be practical, so far as the territory was concerned, except for the City of Cairo. The effect of the set back levee upon water that is going to the spillway that overflows the Riverside Levee is to increase the depth, velocity, and duration of the overflow over and above what the depth, velocity, and duration of the overflow would be without the setback levee in there. If the set-back levee were not there, some of the water would pass to the west and some to the southwest. The witness had calculated the difference caused by the depth of the water by reason of the set-back levee for different floods, for the 1913 and the 1937 floods. For the 1913 flood, it increased the depth from three to four feet; for the 1937 flood, from five to six feet. The increase in depth and velocity of flow results in increased damage from wave action primarily to buildings. With ordinary high water maintenance, none of the floods would have passed over the levee between 55 and 59 feet, except the flood of 1913 and the flood of 1937. With extraordinary maintenance, such as was put on the set-back levee during the flood of 1937, none of them would have overtopped except the flood of 1937, and that would have overtopped. The witness did not think this could have been prevented by extraordinary methods. It would require ordinary high water maintenance to maintain a flood which would have exceeded $58\frac{1}{2}$ on the gauge to overtop the levee; an extraordinary high water maintenance to maintain a flood which would exceed 59. Under the project in question, the entire eleven mile Fuse Plug, with the exception of one mile in the vicinity of the Peasfield Sewer, is supposed to have water pass over it. The set-back levee would not affect the frequency with which the land would be flooded. It would produce a greater depth to the extent that its restricting ef-

feet increases the depth of overflow across the land.
296 Waters which would otherwise pass to the west are confined, and caused to pass over these lands. During the last flood, by reason of the effect of the set-back levee, in restricting and preventing the flow of flood waters to the west, there were additional flood waters diverted from the Mississippi and caused to flow over and across the land herein involved, to an increased depth of about five or six feet. Waters going through the Fuse Plug Section, which would have flowed to the west of this land, were caused to pass over this land. If you want to get the riverside levee up so that there would be a protection of 65 feet on the Cairo gauge, you would have to have three feet free board. You would have to build the riverside levee nine to ten feet higher than it is now. The lowest elevation in the land in question was practically 300. There is one point or two where it goes down to 299. The average elevation is about 304, and the highest 309. If the riverside levee were built up to a height of 65 feet, it would also be possible to fill or build up Cairo.

On Cross-Examination witness testified that the 1937 flood would have topped the riverside levee as it existed. Without high water maintenance in the Fuse Plug Section, the river would have gone over, crevassing at approximately 58 feet, slightly below. The Cairo crest of the 1937 water was 57.6, so that there was a crest there of from 12 to 18 inches above the present protection afforded by the riverside levee on the Cairo Gauge, without high water maintenance. The flood of 1937, if confined, would have reached a stage of 61½ to possibly 62 feet and would have gone over the riverside levee. It was the highest stage of recorded history since 1858 or since 1844. The 1927 flood could have
297 been controlled from overtopping riverside levee with high water maintenance. There is about 55 or 56 miles of levee between Birds Point and New Madrid around the floodway area. The 1912 flood might or might not have gone over the levees as they now exist; 1927 and 1913 would have gone over in the absence of high water maintenance. Ninety-seven percent of the entire river levee was up to fifty-eight and above, some of it to fifty-nine, and some to sixty; the low reaches were comparatively short; there would have been only a few miles that would have had to have emergency work on it; only three percent of that was below fifty-eight feet.

There are several elements that govern the depth of the water, the accumulation of water in the so-called reservoir. There is the element of a quantity of water to be passed

through, the point of origin, the character of the cross-section, whether it is clear or timber, and the head at which it enters, the direction of flow. You are governed, of course, by the quantity of water that enters the flood-way, that would be regulated, broadly speaking, by the size of the intake. The same thing would be true of the outlet, according to your location, and to make an accurate and definite statement, many elements would have to be considered, but to make a general determination they would not. Under the circumstances that existed under 1937 waters, the lower ends of the crevasses opened up. The outflow at the crest was taking care of the inflow. It was going out over and through the lower let back levee for a certain time. That flood-way always takes storage up to a maximum storage, and then waits to get return water, then the floodway largely functions as an overbank flow, so that the increased depth would depend on existing [conditions]. The 1913 flood was not restricted. The 1937 flood would have reached probably three feet higher confined stage at Cairo than the 1913 confined flood at Cairo. With the set-back levee you

298 would have had not more than three feet increased stage and depth at this location with this flood than you actually experienced in 1913, but you would instead of that have a matter of eight or nine feet. The depth would vary with each and every flood. The first crevasse Natural Crevasse No. 1 in the Riverside Levee to go into operation, although known as Nolan Crevasse, is the one below Crosno. Same is about seven miles distant from tract No. 243. Natural Crevasse No. 2 was what was known as Crosno No. 2. No. 1 went into operation about eight o'clock or slightly after on the 25th. No. 2 went into operation about the same time on the morning of the 26th. Natural Crevasse No. 3 was the next one that went into operation in the afternoon of the 26th around five o'clock. No. 4 went into operation considerably later, the witness thought the following Saturday or Sunday. No. 4 was the one that cut through from wave action on the land side. After it cut through it admitted water from the river. No. 1 went into operation prior to the artificial Crevasse occasioned by the dynamiting. It had been in operation about three hours before the Fuse Plug went into operation, so that was admitting head waters from the river into the lower part of the territory. No. 1 Artificial Crevasse is about $14\frac{1}{2}$ or 15 miles from the land of Mr. Danforth. Between artificial Crevasse No. 1 and the land in question at O'Bryan's Ridge, the water would have to build up. There was a railroad. This all had a retarding influence on the flow at the initial stages. No. 1 Natural

carried more water than No. 1 Artificial. It was a heavier load. This was true of both Naturals 1 and 2. The witness stated that he would expect the waters from Natural Crevasse No. 1 over the land before the water from Artificial Crevasse No. 1 would reach there due to the time consumed and the area taken for storage above O'Brien's Ridge, above the railroad. The Natural Crevasse admitted more water than the Artificial Crevasse. The Artificial Crevasses were all above O'Bryan's Ridge, and the Natural Crevasses 299 were all below the Fuse Plug Section along the section of the levee which local interest could have raised. Water from the Fuse Plug Section flowed over the Danforth land, but the witness was unable to state which water reached there first, the Natural overflow, or the Artificial overflow, but witness thought likely the first water would come from the Natural Crevasses.

Mr. London: I assume you will take judicial notice of the Proclamation of President Coolidge? I would like to offer that in evidence.

The Court: All right.

Said proclamation is in words and figures as follows, to-wit:

“December 11, 1928.

“Supplementing my approval of August 13, 1928, of the Board provided for in Section 1 of ‘An Act for the Control of Floods on the Mississippi River and its tributaries and for other purposes’, approved May 15, 1928, which approval excepted and reserved for future action those parts of the report which contemplated the acquiring of rights in land for constructing spillways and floodways, the construction of the back (westward) levee of the Birds Point-New Madrid floodway provided for in the adopted project on the west side of the Mississippi River opposite Cairo, Ill., is approved.

“Land for rights of way for this levee will be secured by condemnation as authorized by law. The purchase of flowage rights over the land within the floodway between the existing riverside levee and the back (westward) levee is authorized provided that in no case shall the purchase price for the flowage on the land above the backwater area in the southern part of the floodway be more than 66% of the present assessed valuation of this land and provided that in no cases shall the purchase price for the flowage on the land within the backwater area be more than a price ranging from 66% of the present assessed valuation of the

land at the upper limit to zero at the lower limit of the backwater area within the floodway.

"The purchase of the land within the floodway immediately adjacent to the proposed relief section of the riverside levee (about 3200 acres) is authorized provided that in no case shall the purchase price be more than twice the present assessed valuation of the land.

"The construction of the relief section proposed for the riverside levee is authorized, provided that it shall not be made until flowage rights have been secured on at least 50% of the area above backwater and 50% of the area below backwater within the floodway.

(Signed) CALVIN COOLIDGE"

300 Mr. London: I offer all the Exhibits that have been identified in this case, including the previous hearings.

Mr. Dyott: Your Honor, Counsel is suggesting that the record be clarified as to Engineering data which was submitted in the Missouri State Life case; I suggest that the record may show that all that is relative to this particular controversy may be admitted, and what is not, of course may or may not be considered by the Court.

Mr. London: Some of it wouldn't apply to the land here, because it had to do with different elevations and different tracts; but as far as applicable here, I assume you want the Engineering testimony to apply?

Mr. Dyott: Yes.

301 Mr. London: If Your Honor please, I desire to offer in evidence a certified copy of the assessment that's made on the land here in question, Section 22 and Section 27. I will just say, I offer the assessment in Sections 22 and 27, the sections here involved, the purpose being to show that the offer that was made in this case was within the two-thirds that was authorized by the President's proclamation.

The Court: You offer his assessment as of what time?

Mr. London: As of 1928, a certified copy.

Said certified copy is in words and figures as follows:

"Ward De Field
Assessor Mississippi County
Charleston, Missouri

August 21, 1934

I do hereby certify that these are the assessed valuation of 1928 assessments against said land.

W 1/2 NE	Sec. 5-23-16	\$1150.00
S 1/2	Sec. 32-24-16	4800.00
All	Sec. 22-25-16	29,250.00
All	Sec. 27-25-16	30,000.00
East 1/2 SW	" 31-25-17	3,000.00

(Signed) Ward DeField

Subscribed and sworn to before me on this the 3rd day of October A. D. 1934.

ELLIS W. HOWLETT

Clerk of the Circuit Court
Mississippi County, Missouri.

Defendant's Ex. 2
M E S 4/21/37"

G. W. MILLER Recalled, testified that construction work began upon the main set-back levee in the Birds Point-New Madrid Floodway on October 21, 1929. It was 98.9 complete on October 31, 1932. They still had a gap to close at Samos, because they did not have the right-of-way where the Missouri Pacific crosses that levee. This was in litigation, pending in the same Court.

Q. But when did you file condemnation suit for this right-of-way you say is still in litigation?

A. I would have to look that up; I couldn't tell you off hand.

Q. Was it filed along with other suits for right-of-way?

A. The record will show.

Q. Mr. Miller, as a matter of fact, after you brought suit, you didn't wait for judgment, did you?

A. Not in all cases, but we did in this.

Q. Didn't you go ahead with the set-back levee and build it?

Mr. Dyott: If the Court please, Mr. Miller has testified that he didn't come in here until after the work had started and after it was well under way.

Mr. London: I think if he knows, he can testify. The Court might take judicial notice of the fact that they went ahead with the set-back levee and didn't pay any attention to judgments.

Mr. Dyott: I am willing that the record may show, if it will, whereby counsel may know, that the Government took Orders of Possession on all set back levee right-of-ways except where the railroad crossed at Samos, and likewise the diversion ditch. As the suits were filed, Orders of Possession were granted by the Court and they were taken over by the Government and then later worked out to a judgment.

The Court: Does that satisfy you?

Q. Let me see if I understand you correctly: you are now testifying that ninety-eight and nine-tenths per cent. was completed October 31, 1932, and no work has been done since that date, is that right?

A. There has been work done on it, because slides developed on the set-back levee and we replaced them.

303 Q. I don't mean that; I mean the one and one-tenth per cent. of work not completed.

A. I don't know exactly what the one and one-tenth per cent. covers, but in that percentage is the closing at Samos. This is the best information that I have available, Mr. London, here; I am giving you all I have.

Q. Mr. Miller; as an Engineer, do you consider this all one project, I mean the spillway and set-back levee, one proposition or one project?

Mr. Dyott: I object to that question; it is not the subject of expert opinion; it is a matter of law.

The Court: Sustain the objection.

Mr. London: Note my exception.

To which action and ruling of the Court, defendant, Danforth, by counsel, then and there duly excepted and still continues to except.

COLONEL EUGENE REYBOLD, testified he was a Lieutenant Colonel, Corps of Engineers, United States Army, stationed at Memphis, Tennessee. He had charge of what is known as the Memphis Engineers District 1, extending from Cape Girardeau along the main stream to the mouth of the Arkansas River, and West along the White, St. Francois and Arkansas Valleys throughout, with all their tributaries. This included the Birds Point-New Madrid extension. He was

familiar with the floodway project as it applied to that area and had been over the same and had been in charge of the same since May of 1935. His predecessor was Major W. H. Hoge. Major R. D. Burdick was the Military Assistant of witness, and in the absence of the witness was in charge. He was in the area in question during the recent flood in January, 1937. He was on a tour of inspection just about 304 the crest or a little bit after the crest. That was after the water topped the levee. Major Burdick was sent by the witness on January 24th, Sunday, from Memphis, to assume charge of what they call the Cairo sector.

Q. Did you issue any instructions in connection with the dynamiting of that levee?

A. I issued instructions to Major Burdick when I sent him from Memphis on January the 24th, that he should open the floodway.

Mr. Dyott: That question calls for a "Yes" or "No" answer, and before he gets into that enquiry I desire to get an objection into the record, Your Honor. I move to strike that out as not responsive, and the Colonel may answer that by "Yes" or "No."

The Court: Sustain the motion.

A. Yes.

Q. What were those instructions?

Mr. Dyott: If the Court please, the Government desires at this time to interpose an objection to the enquiry by counsel, in addition to the objection interposed as of yesterday in this record, and with the Court's permission I would like to read it into the record here; I have taken some time to prepare it and I would like to read it into the record. The Government contends, in this connection, that the Flood Control Act is definite and specific and that the record now is so that the Government interposes an objection to any enquiry and the testimony on the part of any witness, seeking to show or showing the artificial crevassing by dynamite, or otherwise, of any portion of the river-side levee relating to the Birds Point-New Madrid Floodway project, for the reason that, in the first instance, the Flood Control Act of May 15, 1928, provides that the area within the confines of the river-side levee shall have protection until the entire floodway project is completed, and any artificial crevassing of any 305 portion of said river-side levee prior to the completion of said levee, by any Government employee, would

be an act without the authority and against the mandate of Congress as declared in that Act; that the Act of May 15, 1928, further imposes the limitation of fifty-five feet on the Cairo Gauge as the maximum at which the river-side levee may be minimized under the Act and any minimization below said fifty-five feet on the Cairo Gauge by any Government employee, regardless of who the official may be and irrespective of the manner in which the same may be accomplished, would be an act without the authority of and in excess of and against the planned mandate of Congress; that it is a matter of Court record that the Birds Point-New Madrid Floodway project has not yet been completed because all flowage easements have not yet been acquired, nor have all records specified in the plan of the project on file in this Court been completed; that the completion of the acquisition of flowage easements and the acquisition of other necessary titles is a condition precedent to any minimization of the river-side levee to fifty-five feet specified in the plan on file in this Court and authorized by the Act, and until the acquisition of said titles has been completed and all of the flowage easements are acquired, the fuse-plug specified in the plan on file in this Court and with reference to which this proceeding is bound part and parcel may be created by the minimization of the river-side levee only to the extent specified in said plan; that because of the premises the Government is not bound in this proceeding and under the Flood Control Act of May 15, 1928, by the result of any act consisting of crevasing, by dynamite or otherwise, any portion of the river-side levee thereafter having reference to the Birds Point-New Madrid Floodway, and any act of any employee, agent or representative of the Government that is without the authority of said Act of Congress cannot in any wise be charged against the Government for the purpose of showing or

306 claiming damages in this proceeding which by the Petition filed herein specifically describes the taking all conditions surrounding same and the title desired to be acquired; that any artificial crevasing by dynamite or otherwise of any portion of the river-side levee by any Government employee, regardless of whom he may be, would be in the nature of a tort on the part of the individual doing it; that this is a condemnation proceeding instituted to determine the damages, if any, to the owners of the land herein on account of the proposed taking described in Plaintiff's Petition filed in this cause and under the authority of and pursuant to the provisions of the Flood Control Act of May 15, 1928; that a limited title in the land described in this proceeding is sought; that all conditions surrounding the acquisition of the

title desired to be acquired are specifically set forth in Plaintiff's Petition and neither the kind nor extent of title sought to be acquired under the plan on file in this Court relating to this proceeding exceeds the limits of authority provided by Congress in said Act because the easement desired to be acquired has reference to a minimization of the river-side levee according to the plan on file, and that is the reduction to fifty-five feet on the Cairo Gauge imposed by Congress. Now, just a further addition to that, Your Honor: what we mean in our position is just this: this is a suit in condemnation; the plan has to be followed; it is an adopted plan; those specified are all on file here. If the people in that section desired to maintain that levee at fifty-five feet under the plan and under the mandate of the Flood Control Act, that was one thing; now, in response to a matter of emergency where life and death and property may be involved, that is entirely another thing and should be established by a separate and independent action; and what counsel is seeking to do by bringing this in is to show acts which were not for the sole purpose of the completion of this project; that wasn't 307 the purpose of it; the purpose of it was to relieve, to save life, the same as if a town was burning and it was necessary to go in and tear down half of the center of the town in order to stop the burning. There are two separate and distinct causes, and I submit that the showing of any act by any individual employee of the Corps of Engineers, or by any civilian or anyone in connection with that would be treated as an overt act and independent of the cause on trial, and evidence of that act is not relevant and cannot be accepted.

The Court: Overrule the objection.

Mr. Dyott: Exception.

A. My instructions to Major Burdick were to the effect that he was authorized and directed to place the Birds Point-New Madrid Floodway in operation.

Mr. Dyott: May the record show, Your Honor, that my objection applies now to each and every question without repeating it?

The Court: The record may so show.

Mr. Dyott: The exceptions as well?

The Court: Yes.

Q. Colonel, how many days was that before the fuse-plug was cut and dynamited?

A. I believe it was dynamited the next day.

Q. Did you get any instructions from any of your superiors to that effect?

A. No, sir.

The witness was not present at the time the levee was cut or dynamited. He recalled no telephone conference with Burdick about it. He did not personally issue instructions with reference to sending out notices or warnings to the inhabitants of this floodway area, but believed it was done just prior to the return of the witness from a trip out West. He only knew through hearsay what method was used. Witness was immediately in charge of the restoration of the

Riverside Levee. He had received instructions with
308 reference to the restoration of the riverside levee, and they were proceeding with contracts down there. He

issued those instructions to his general office force. He had at one time received instructions from the Chief of Engineers that the levee was to be restored only to fifty-five feet. These instructions were issued from the office of General Edward M. Markham, and came through military channels in the regular and usual way. These orders were issued to the witness personally as the officer in charge of the Memphis area, and came to the District Engineer. These orders were in writing and the witness had those orders in Memphis. Then in turn the witness issued instructions to his office force that the riverside levee was only to be restored to the height of fifty-five feet on the Cairo Gauge. That subsequently was countermanded, and since then the witness issued instructions to restore it to the existing grade and section.

Q. Did you take the matter up with anybody when you received orders to restore it only to fifty-five feet?

Mr. Dyott: If the Court please, I submit that the enquiry that counsel has indulged in has elicited all of the material and relevant matter that's necessary in the case; I object to any further enquiry in that connection as immaterial.

Mr. London: The purpose of it is to show the influence of the Army Engineers; they don't feel bound by anything. If they get an idea they can change it; all they have to do is change it.

Mr. Dyott: I submit it is entirely immaterial, and I object to it.

The Court: Sustain the objection.

Mr. London: Note my exception.

MAJOR R. D. BURDICK, testified that he was a Major in the Corps of Engineers, United States Army, stationed at Memphis, Tennessee, and had been there two years on June 10, 1937. He was Military Assistant to Colonel Reybold, the District Engineer. His training as engineer consisted of graduation from Cornell with, a degree of Civil Engineer, 1914. He had been connected with the Army nearly twenty-one years. He is in the military service of the Army. He came to the floodway area January 24, 1937. He was sent there by Colonel Reybold. He was authorized and directed to open the fuse-plug section of the levee, thus placing the Birds Point-New Madrid Floodway into operation.

Q. Just what did you do, did you have occasion to open this fuse-plug section?

Mr. Dyott: Well, now, if the Court please, in his enquiry as to the actual set of crevassing the levee, I desire that the objection heretofore made apply to the testimony of this witness, to each and every question relative thereto.

The Court: It may so apply.

Mr. Dyott: And save our exceptions accordingly.

The witness arrived at Cairo, Illinois, on January 24th; that is, not inside the area known as the floodway; he went to the floodway area on January 25th, about 7:00 A. M. About forty or fifty government employees went with him. With one exception, these employees were not in the army. The employees under the charge of witness proceeded to place dynamite in the levee and explode it.

Q. When you arrived there, the water wasn't going over the levee at the time, was it?

A. There was a small trickle of water over the levee.

Q. Had you cut any of the levee before you dynamited it?

A. No, sir, we had not.

Q. Did you have any trench cut right in back of it?

A. There were three small trenches across when I arrived.

He did not know who dug those except from hearsay. The levee was dynamited, and the first shot went off at eleven-twelve A. M., January 25th. A portion of the levee itself, about sixty feet long, was dynamited. The witness did not know the depth, did not measure it. One place was dynamited at eleven-twelve. The next shot was fired about an hour later, approximately two or three hundred feet. There were two places dynamited at that particular place. They dynamited two more holes at another position on that

same date, during the afternoon. The last shot went off about 5:30 P. M.

Upon being asked to describe the places where the shots were fired, the witness stated the first one was at what they know as Levee Mile Post 34, that is, the first two openings; the second one at Levee Mile Post 38. These locations are approximately within a few hundred feet. He did not order any sacks removed before the dynamiting. These crevasses that were created by these shots or explosions were approximately the same in size, in the neighborhood of about sixty feet long. The witness could not give the depth. The witness issued instructions that notice or warning be given to the inhabitants of this floodway area. He issued that notice January 20th. He did not know whether the notice was sent out. The notice was a typewritten warning to the residents of the floodway that the floodway would probably be flooded within the next week.

On Cross-Examination witness testified that the warnings which were put out did not indicate or did not particularly specify that the floodway would come into use; simply that it would come into use.

—
This was all the evidence offered in the case.

—
And thereupon the case was submitted, and by the Court taken under advisement.

And thereafter, and on to-wit: the 23rd day of April, 1937, the Court handed down its decision in words and figures [—]

311

(Decision.)

In the United States District Court for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,

Suit 716 vs.

Beatrice McDaniel, et al., Defendants.

Tract 243.

Tract 243—1033.56 acres.

Award of First Commission, \$20,409.90, heretofore set aside on exceptions of plaintiff as excessive.

Award of Second Commission \$8,428.25, heretofore set aside on exceptions of defendant, William H. Danforth, as inadequate.

Award of Third Commission, \$17,921.70, to which both plaintiff and defendant, William H. Danforth, have filed and submitted exceptions.

Exceptions of both plaintiff and defendant, William H. Danforth, to the report and award of the Third Commission are overruled.

United States District Judge.

Report of Commissioners approved and confirmed; judgment of condemnation awarded plaintiff as prayed; damages of defendant fixed at the amount set out in Report of Commissioners and judgment entered accordingly in the above case this day.

J. J. O'C.

April 23, 1937.

And on said day the following judgment was entered:
312 as follows, to-wit:

Findings and Judgment.

"In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
Case No. 716 vs.
Beatrice McDaniel, et al., Defendant.

-(Tract No. 243.)

Now on this, the 23rd day of April, 1937, having considered the evidence submitted by both plaintiff and defendants in the above numbered cause as to Tract No. 243, being a portion of the real estate described in said petition, and being fully advised in the premises, and as to all matters pertaining thereto, and upon all the records in the case, the Court doth find and adjudge and decree in the manner following, to-wit:

The Court finds that the United States of America is plaintiff and that the following are defendants:

Beatrice McDaniel, Poplar Bluff, Missouri;

William H. Danforth, St. Louis, Missouri;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

313 Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$15,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

.

The Court doth further find that this proceeding was instituted by the plaintiff in the way and manner as is by statute, in such cases, made and provided; that said petition sets forth a complete cause of action which has for its purpose, the ac-

quirement by proceedings in condemnation of a perpetual easement over, upon and across the lands described in said petition, and which said easement is acquired for the use and benefit of said plaintiff in the establishment of a floodway, as defined and described in said petition, and in furtherance of, and in compliance with; and in conformity to the act of Congress of May 15, 1928, Chapter 569, entitled "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for other purposes", and which is designated and known as the "Flood Control Act".

The Court doth further find that this action was duly authorized and begun as provided by law, and that all proceedings thereunder, including the issuance of all process, writs and notices, are in conformity with the statute in such case made and provided;

And the Court doth further find that all persons named as defendants herein have been lawfully and legally served with all necessary writs and notices required by law, and in the way and manner by law required and prescribed, and that the Court has jurisdiction of both the subject matter involved in said petition, and of all parties named as defendants;

314 The Court doth further find that the said plaintiff gave due, proper and legal notice to all defendants, of the place where and time when it, the said plaintiff would apply for the appointment of appraisers or viewers of the premises described in said petition, to assess damages and compensation to be paid the said owners thereof for the use and purpose set forth in said petition; and that the said Court did in accordance with said notice, upon the 7th day of February, 1934, appoint three viewers, to-wit:—E. P. Deal, R. L. Shelby and E. C. Davis to view said premises, to fix the damages done said property, and to assess the compensation to be paid therefor by the plaintiff;

The Court doth further find that the said viewers before entering upon the discharge of the duties assigned to them by the Court, and the law in such case made and provided, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 4th day of May, 1934, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by

law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report; that the amount awarded by said viewers in their report filed on May 4, 1934, as to said Tract No. 243 was \$20,409.90; that exceptions to said viewers' award as to said Tract No. 243 were duly filed both by the plaintiff herein and by the defendant William H. Danforth; that on October 23, 1935, upon due notice to all parties, said cause came on to be heard upon the said exceptions, and that upon the evidence presented by both plaintiff and defendants, the Court did sustain the exceptions of the plaintiff and did overrule the exceptions of the defendant.

315 William H. Danforth, and vacate and set aside the said award of viewers as contained in their report filed on May 4, 1934, all as set out in the order of the Court filed and entered on January 28, 1936; that on April 10, 1936, the Court referred the matter of the assessment of damages as to said Tract No. 243 to a new board of viewers, to-wit: Messrs. Stephen Barton, J. E. Schmuke and J. H. King;

The Court finds that the said viewers before entering upon their duties as such, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 29th day of May, 1936, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form; that the amount awarded by said viewers in their report filed on May 29, 1936, was \$8428.25;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

That the defendant William H. Danforth did on the 5th day of August, 1936, and within the time and in the way and manner prescribed by law, duly except to the report of said viewers filed on May 29, 1936, as to the amount assessed therein for damages to said Tract No. 243; that no exceptions to said viewers' report were filed by the plaintiff herein, nor by any other of the defendants, and said persons so failing to file exceptions are hereafter barred from so doing, or voicing any objections to said viewers' report;

The Court further finds that on the 23rd day of October, 1936, upon due notice to all parties, said cause came on to be heard upon the said exceptions of the defendant William H. Danforth, and that upon the evidence presented by both plaintiff and defendant, the Court did sus-

tain the exceptions of the defendant, and did vacate and set aside the said award of viewers as contained in their report filed on May 29, 1936, all as set out in the order of the Court filed and entered on October 24, 1936; that on November 28, 1936, the Court re-referred the matter of the assessment of damages as to said Tract No. 243 to the same board of viewers, to-wit, Messrs. Stephen Barton, J. E. Schmuke and J. H. King;

The Court finds that the said viewers before entering upon their duties as such, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 11th day of March, 1937, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form; that the amount awarded by said viewers in their report filed on March 11, 1937, was \$17,921.70;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

That the plaintiff did on the 30th day of March, 1937, and within the time and in the way and manner prescribed by law, duly except to the report of said viewers filed on March 11, 1937, as to the amount assessed therein for damages to said Tract No. 243, and that the said William H. Danforth filed his exceptions to said viewers' report on March 20, 1937; that no exceptions to said viewers' report were filed by any of the other defendants, and said persons so failing to file exceptions are hereafter barred from so doing, or voicing any objections to said viewers' report;

317 The Court further finds that on the 21st day of April, 1937, upon due notice to all parties, said cause came on to be heard upon the exceptions of plaintiff and defendant William H. Danforth; that all the issues and matters in connection with said Tract No. 243 were submitted to the Court, and that upon evidence submitted by both plaintiff and defendants, the Court did overrule the said exceptions of the plaintiffs, and of the defendant William H. Danforth, and did confirm the said viewers' report as to said Tract No. 243; that the plaintiff is entitled to a judgment in condemnation of said land and the defendants herein having any right, title or interest in and to said Tract No. 243 are entitled, in solido, to damages in the sum of \$17,921.70, the said sum

being the full amount to which said defendants named in said petition as claiming an interest in and to said tract, and any and all other persons who may be found entitled thereto, are entitled for the purposes for which said action in condemnation was brought, and being the same amount of damages as found by said viewers in their report filed as aforesaid, on March 11, 1937;

The Court finds that the premises described in this petition as Tract No. 243, over which the plaintiff seeks to condemn the said easement and which said premises were viewed by said commissioners or viewers, and which are included in the report thereof, are bounded, defined and described as follows: Tract No. 243, being:

243 Floodway.

Description.

A tract of land lying wholly within Sections 22 and 27, T. 25 N., R. 16 E., of the 5th Principal Meridian, Mississippi County, Missouri, as shown on the plat, and being more particularly described as follows:

The east half of the said section 22, and the east half of the said section 27, containing 640 acres, more or less;

The part of the west half of the said section 22, and the part of the west half of the said section 27; lying southeast of the Birds Point-New Madrid Floodway levee right of way, and being more particularly described as follows: Beginning at a point "A", the said point "A" being the southeast corner of the southwest quarter of the said section 27; thence along the south line of the said southwest quarter of the said section 27, South 89° 29' West, 2142.5 feet to point "B", the said point "B" being on the southeast boundary line of the said Floodway levee right of way; thence along the said boundary line, North 0° 30' East, 714.7 feet to point "C"; thence along the said boundary line, North 89° 30' West, 65.0 feet to point "D"; thence along the said boundary line, North 0° 30' East, 1806.5 feet to point "E"; thence along the said boundary line, North 89° 37-1/2' West, 20.0 feet to point "F"; thence along the said boundary line, North 0° 15' East, 2262.7 feet to point "G"; thence along the said boundary line, North 20° 02' East, 446.7 feet to point "H", the said point "H" being on the south line of the said west half of the said section 22, and being North 89° 27' East, 562.0 feet from the southwest corner of the said section 22; thence along the said boundary line, North 20° 02' East, 686.0 feet to point "I"; thence along the said boundary line, South 69° 58' East, 145.0 feet to point "J"; thence along the said

boundary line, North 20° 02' East, 1162.7 feet to point "K"; thence along the said boundary line, North 11° 59' East, 3636.5 feet to point "L", the said point "L" being on the north line of the said west half of the said section 22; thence along the said north line of the west half of the said section 22, South 89° 43-1/2' East, 490.4 feet to point "M", the said point "M" being the northeast corner of the said west half of the said section 22; thence along the east line of the said west half of the said section 22, South 0° 09' East, 5250.0 feet to point "N", the said point "N" being the northeast corner of the said west half of the said section 27; thence along the east line of the said west half of the said section 27, South 0° 09' East, 5176.9 feet, more or less, to the point of beginning; the said part of the said west half of the said section 22, and the said part of the said west half of the said section 27, containing 393.56 acres, more or less.

There is excepted a ditch easement for right of way of Lat. #2 of D. D. #23 over 19.85 acres, more or less, and also a County road easement for right of way over 11.02 acres, more or less; the said tract containing 1033.56 acres, more or less.

The bearings of boundaries in this description are referred to true North.

The Court doth further find that the easement which plaintiff seeks over and across the above described premises is in completion of the project provided for, and in compliance with, the Act of Congress of May 15, 1928, Chapter 569;

Now Therefore, it is ordered, adjudged and decreed that the said exceptions to the report of the viewers as to said Tract No. 243 should be, and the same are hereby overruled; that the said award of commissioners as to said Tract No. 243 should be, and the same is hereby confirmed and the sum of \$17,921.70 is awarded, in solido, to the defendants 319. named in said petition as claiming an interest in and to said land and to any and all other persons who may be found entitled thereto; that the plaintiff-condemnor, to-wit, the United States of America, by virtue of this proceeding shall have judgment in condemnation against the premises described in said petition, and for the purposes therein defined, and against the defendants therein and each and all of them, jointly and severally as their rights may appear; and that the said plaintiff shall acquire the full, complete and perpetual easement over and across said lands, and the power, right and privilege to cause said lands hereinbefore described to be used for the purpose of a floodway as contemplated by the Act of Congress of May 15, 1928, Chapter 569, and as more fully described in House Document 90 which is made

a part of said Act, and that such right shall forever vest in the plaintiff herein, the United States of America; that the said defendants, and each and all, jointly and severally, shall be divested of any and all right, claim, title or interest, of any name, nature or description, that shall in any wise conflict with or interfere with the right of said plaintiff to establish and maintain the aforesaid floodway, and such right shall be vested in the United States of America forever; and

It Is Further Ordered that the plaintiff herein shall pay into the registry of this court the sum of \$17,921.70, in solido, which shall be held for the use and benefit of the defendants named in said petition as claiming an interest in and to said Tract No. 243, and any and all other persons who may be found entitled thereto, in the way and manner and in proportion as this Court shall hereafter order, adjudge and decree; and that upon the payment of the said sum, the plaintiff shall be entitled to the relief prayed for in said petition, and as prayed.

CHARLES B. DAVIS,
United States District Judge.

Dated this, the 23rd day of April, 1937.

320 And thereafter, on the 27th day of April, 1937, plaintiff filed its motion for new trial as to Tract #243.

And thereafter on the 14th day of July, 1937, defendant, Danforth, filed its motion for new trial as to Tract #243.

In order to avoid repetition in the record the following stipulation was entered into:

(Stipulation that Motions for New Trial may be considered as part of Bill of Exceptions, etc.)

In The District Court of The United States Within and for the Southeastern Division of The Eastern Judicial District of Missouri.

United States of America, Plaintiff;

vs.

Beatrice McDaniel, et al., Defendants.

Cause No. 716. Tract No. 243.

It is hereby stipulated by and between the parties to the above entitled cause, through their respective counsel, that the motions for new trial filed by the plaintiff and defendant need not be rewritten here but may be considered as part of this bill of exceptions by reference to the motions for new

trial of both plaintiff and defendant, which are called for by the praecipe and are set out in the record.

JOHN WEBER, Special Attorney,
Department of Justice.
Attorney for Plaintiff.

LEAHY, WALTHER, HECKER & ELY
& J. L. LONDON,
Attorneys for Defendant, William
H. Danforth.

321 And thereafter the said separate motions of plaintiff and defendant Danforth for new trial as to tract #243 were argued and submitted by plaintiff and taken as submitted by defendant Danforth.

And thereafter, and on to-wit: the 30th day of November, 1937, the motion for new trial of plaintiff was overruled, to which action of the Court plaintiff duly excepted.

And thereafter, and on to-wit: the 30th day of November, 1937, the motion for new trial of defendant, William H. Danforth, as to Tract #243 was overruled, to which action of the Court the said defendant, William H. Danforth, duly excepted.

(Approval of Bill of Exceptions by District Judge and Counsel.)

Forasmuch, as said matters do not appear of record herein, the defendant, William H. Danforth, has prepared and now presents this, his Bill of Exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is accordingly done on this 1 day of June, 1938.

CHARLES B. DAVIS,
Judge, Southeastern Division, Eastern
Judicial District of Missouri.

Approved:

HARRY C. BLANTON, U. S. Atty.
L. JOHN WEBER, Special Atty. Dept. of
Justice.

Attorneys for Plaintiff.

LEAHY, WALTHER, HECKER &
ELY, & J. L. LONDON,
Attorneys for Defendant, William
H. Danforth.

Endorsed: Filed June 1-1938, Jas. J. O'Connor, Clerk.

322

Praecepte for Transcript.)

(Filed April 11, 1938.)

The Clerk of the District Court is requested to prepare for transcript to the United States Circuit Court of Appeals for the Eighth Circuit the portions of the record of this cause, as follows:

1. Petition, Cause 716, Tract 243, omitting caption, but inserting the following paragraphs: Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, (omitting 10-a and 10-b), inserting 10-Z (35), 10-Z (36), tract #243, including the description of tract #243, including the description of tract #243, 10-Z (38), 10-Z (39), 10-Z (40), 10-Z (41), 10-Z (42), last paragraph in petition before prayer "that the plaintiff, etc." and ending "to be acquired by these proceedings." Prayer of petition. Affidavit.
2. Interlocutory order appointing commissioners, February 7, 1934.
3. Report of commissioners of May 4, 1934.
4. Exceptions to commissioner's report filed by plaintiff May 9, 1934.
5. Exceptions of Danforth to commissioner's report of \$20,409.90 filed June 4, 1934.
6. Order authorizing defendant, William H. Danforth, to file answer and cross-bill or other pleading, filed July 5, 1934.
7. Application for dedimus to take depositions, filed August 25, 1934, including affidavit of J. L. London, attorney. Order directing issuance of same, and dedimus issued.
8. Stipulation dated August 30, 1934, signed the 6th day of September, 1934, by Harry H. Blair for plaintiff and J. L. London for defendant.
- 323 9. Answer and counterclaim of William H. Danforth filed September 10, 1934.
10. Motion to strike answer and counterclaim, filed by plaintiff October 8, 1934.
11. Motion to amend exceptions, filed October 12, 1934.
12. Notice filed October 12, 1934, of motion to be filed to amend exceptions filed on or about June 4, 1934.
13. Memorandum of Court dated October 12, 1934, as corrected, in connection with the motion of defendant Danforth to amend exceptions.

14. Order and Memorandum of Court sustaining motion to strike answer and counterclaim argued on October 15, 1934, before Honorable C. B. Faris and exception noted by defendant.

15. Motion of defendant, William H. Danforth, to vacate award of viewers, to set aside findings of fact, interlocutory decree, and of appointment of viewers, and for judgment, as amended, under date of October 26, 1934, filed October 18, 1934.

16. Term bill of exceptions of defendant, William H. Danforth, as to Tract #243 filed October 22, 1934.

17. Term bill of exceptions filed October 22, 1934, in connection with the ruling of the Court on the motion of William H. Danforth to amend exceptions, the Court overruling the motion under date of October 12, 1934, as to amending that part of the exceptions filed, by adding after the word "award" in line 5, on page 2, the quotation set forth in the motion to amend.

18. Motion to modify by interlineation filed October 26, 1934.

19. Order of October 26, 1934, granting defendant Danforth leave to amend his motion filed October 18, 1934, to vacate award of commissioners as to tract #243 by interlineation.

20. Order and Memorandum of Judge Davis filed October 21, 1935, reading as follows:

"Motion of William H. Danforth to vacate the award of viewers to set aside findings of fact, interlocutory decree, the appointment of viewers and for judgment on Tract #243 and #281 overruled for the reason: That the subject matter of said motion should have been presented by answer and that Present motion has been untimely filed and presented.

Exceptions noted by defendant. Charles B. Davis,
Judge.

324 21. Stipulation dated October 26, 1935, with reference to correction so that #281 may be marked to read #243 on the Memorandum filed under date of October 12, 1934.

22. Term bill of exceptions on the motion of defendant, Danforth, to vacate the award of viewers, setting aside find-

ings of fact, interlocutory decree, and for judgment, argued, submitted, and ruled on on October 21, 1935.

23. Term bill of exceptions filed by William H. Danforth March 30, 1936, as to Tracts #243 and #281.

24. Order of January 28, 1936, sustaining plaintiff's exceptions.

25. Order of April 10, 1936, appointing viewers.

26. Exceptions of Danforth of April 10, 1936, to order appointing viewers.

27. Report of commissioners filed May 29, 1936. (\$8428.25)

28. Motion of William H. Danforth renewing motion filed on April 8, 1935, and overruled October 21, 1935, to vacate award of viewers, set aside the findings of fact and interlocutory decree and appointment of viewers and for judgment in the sum of \$31,681.98, Filed August 5, 1936, as to Tract #243.

29. Exceptions of August 5, 1936, of William H. Danforth to report of commissioners.

30. Term bill of exceptions following motion filed August 5, 1936, to vacate award of viewers, etc.

31. Motion of defendant for judgment filed October 23, 1936.

32. Order of October 23, 1936, overruling motion for judgment.

33. Order of October 24, 1936, sustaining defendant's exceptions.

34. Order appointing commissioners to Tract #243 on November 28, 1936.

35. Term bill of exceptions filed November 30, 1936.

36. Commissioner's report filed March 11, 1937, awarding \$17,921.70.

37. Exceptions of plaintiff filed March 30, 1937, to viewers' report filed March 11, 1937.

38. Exceptions of defendant, William H. Danforth, filed March 30, 1937, to the report of the viewers, Stephen Barton, J. H. King, and J. E. Schmucke, which report was filed March 11, 1937.

39. Findings and judgment filed April 23, 1937, entering up judgment in favor of plaintiff and for the easement and

in favor of defendant in the sum of \$17,921.70, dated April 23, 1937. Memo filed.

325 40. Order filed April 23, 1937, overruling exceptions of both plaintiff and defendant, and exceptions saved by defendant, Danforth.

41. Plaintiff's motion for new trial as to Tract #243, filed April 27, 1937.

42. Defendant's motion for new trial as to Tract #243, filed July 14, 1937.

43. Disclaimer of Northwestern Mutual Life Insurance Company and petition for dismissal of proceedings as to said corporation and Wilbur E. Hoag, and order of dismissal, filed October 19, 1937.

44. Orders overruling motions for new trial of plaintiff and defendant of November 30, 1937.

45. Exceptions of plaintiff and defendant to orders overruling motions for new trial.

46. Petition for appeal.

47. Bond on appeal and approval thereof.

48. Assignment of Errors.

49. Citation and acknowledgment of service.

50. Order allowing appeal.

51. Order extending time thirty days for filing bill of exceptions.

52. Order extending time for filing transcript.

53. Order extending time twenty days for filing praecipe.

54. Order extending time fifteen days additional for filing praecipe. Order dated March 15, 1938.

55. Order of March 22, 1938, extending time for filing bill of exceptions to April 27, 1938, and extending time for filing transcript until and including May 7, 1938.

56. Order extending time for filing praecipe fifteen days additional from and after March 30, 1938, order being made March 30, 1938.

57. Praecipe for transcript.

58. Bill of exceptions, including abstract of depositions of Edward M. Markham, Patrick J. Hurley, and Major Somervell, and exhibits.

59. Record entry of approval and filing of Bill of exceptions.
 326 60. Clerk's certificate.

LEAHY, WALTHER, HECKER & ELY & J. L. LONDON
 Attorneys for Defendant,
 William H. Danforth.

Copy received this 7th day of April, 1938.

L. JOHN WEBER,
 Special Attorney, Department
 of Justice

JOHN C. DYOTT
 Attorney for Plaintiff.

Enclosed: Filed Apr. 11, 1938. Jas. J. O'Connor, Clerk.

327 (Clerk's Certificate to Transcript.)

United States of America,
 Southeastern Division of the
 Eastern Judicial District Missouri:—ss.

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern Judicial District of Missouri, Southeastern Division thereof, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and files in cause No. 716, of United States of America, Plaintiff, vs. Beatrice McDaniel, William H. Danforth, Wilbur E. Hoag, as Trustee, etc., et al., are defendants, in the matter of the appeal of William H. Danforth, save as restricted by praecipe for transcript hereinbefore set forth, and as noted therein, and such matters as appear since the filing of the praecipe, as the same remains on file and of record in said cause in my office; and that the original citation is hereto attached and herewith returned.

(Seal of the
 U. S. Dist. Court,
 S. E. Div. of the
 Eastern Judicial
 Dist. of Missouri)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at office in Cape Girardeau, Missouri, this 28th day of June 1938.

JAS. J. O'CONNOR,

By James M. Arnold,
 Deputy Clerk.

Filed Jul 15, 1938. E. E. Koch, Clerk.

[fol. 217] Ruling of the Court on Exceptions To Awards.

In the United States District Court For the Southeastern,
Division of the Eastern Judicial District of Missouri.

United States of America,
No. 716. vs. Tracts 243 and 281.
McDaniel, et al.

Tract 243 contains 1033.56 acres, and the award of the Commissioners was the sum of \$20,409.90.

This is a high, well developed tract of land, about 887 acres cleared and in cultivation, about 108 acres in woodland, and about 37 acres in ditches and ponds. It cannot be said that the average per acre award is excessive, so far as the land in cultivation is concerned. But as to woodland, ditches and ponds, this average is too high.

Plaintiff's exceptions to the aggregate award of the Commissioners are sustained for the reason that said award is excessive.

CHARLES B. DAVIS,
U. S. District Judge.

Endorsed: Filed Jan. 28, 1936. Jas. J. O'Connor, Clerk.

**[fol. 218] (Order For Certification of Ruling on Exceptions
to Awards to Appellate Court.)**

In the United States District Court For the Southeastern
Division of the Eastern Judicial District of Missouri.

United States of America,
No. 716. vs.
Beatrice McDaniel, et al.

Now on the 13th day of October, 1938, on oral motion and request of J. L. London, Esq., counsel for defendant, W. H. Danforth, the Clerk of this Court is hereby directed to certify to the United States Circuit Court of Appeals for the Eighth Judicial Circuit a true and correct copy of the Ruling of Hon. Charles B. Davis, United States District Judge as to tract No. 243, filed January 28, 1936.

GEO. H. MOORE,
U. S. District Judge.

[fol. 219] (Certificate of Clerk to Rulings on Exceptions to Awards, etc.)

United States of America,
Eastern District of Missouri,
Southeastern Division.—ss.:

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Ruling of the Court on Exceptions to Award as to tract No. 243, in the cause of United States of America vs. McDaniel, et al., No. 716, filed January 28, 1936, together with a copy of the order of Hon. Geo. H. Moore, Judge of said Court directing the Clerk of this Court to certify to the United States Circuit Court of Appeals a copy of the Ruling of Hon. Charles B. Davis, Judge, as to said tract as filed January 28, 1936, now remaining among the records of the said Court in my office.

Seal
U. S. Dist. Court
S. E. Div.
East. Jud. Dist.
of Mo.

In Testimony Whereof, I have hereunto
subscribed my name and affixed
the seal of the aforesaid Court
at Cape Girardeau, Missouri, this
13th day of October, A. D., 1938.

JAS. J. O'CONNOR,
Clerk,
By James M. Arnold,
Deputy Clerk.

(Endorsed): No. 11,255. Certified copy Ruling of the Court on Exceptions to Awards as to Tract No. 243. Filed in U. S. Circuit Court of Appeals on October 15, 1938.

[fol. 219] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

William H. Danforth, Appellant,
No. 11,255. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellant.

J. L. LONDON

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jul. 15, 1938.

(Appearance of Mr. L. John Weber and Mr. Harry C. Blanton as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

L. JOHN WEBER,
HARRY C. BLANTON.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jul. 19, 1938.

[fol. 220] (Appearance of Mr. Charles R. Denny, Jr., as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the United States of America.

CHARLES R. DENNY, JR.,
Attorney, Dept. of Justice,
Wash. D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Nov. 14, 1938.

(Appearance of Mr. Thomas E. Harris as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

THOMAS E. HARRIS,
Attorney, Department of Justice.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
May 12, 1939.

(Order of Argument.)

October Term, 1938.

Wednesday, November 15, 1938.

(Before Judges Sanborn, Woodrough and Thomas.)

This cause having been called for hearing in its regular order, argument was commenced by Mr. J. L. London for appellant, continued by Mr. Charles R. Denny, Jr., Attorney, Department of Justice, for appellee, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

[fol. 221]

(Order of Submission.)

October Term, 1938.

Wednesday, November 16, 1938.

(Before Judges Sanborn, Woodrough and Thomas.)

This cause having been called for further hearing, argument was resumed by Mr. Charles R. Denny, Jr., Attorney, Department of Justice, for appellee, and concluded by Mr. J. L. London for appellant.

Thereupon, this cause was submitted to the Court on the manuscript of the record from said District Court and the briefs of counsel filed herein.

[fol. 222] (Opinion on First Submission.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, A. D. 1938.

March 4, 1939.

William H. Danforth, Appellant,
No. 11,255. vs.
United States of America, Appellee.

Appeal from the District Court of the United States for
the Eastern District of Missouri.

Mr. J. L. London (Messrs. Leahy, Walther, Hecker &
Ely were with him on the brief) for appellant.

Mr. Charles R. Denny, Jr., Attorney, Department of
Justice (Mr. Carl McFarland, Assistant Attorney General,
Mr. L. John Weber and Mr. William R. Sherwood, Special
Attorneys, and Mr. Oscar A. Provost, Attorney, Depart-
ment of Justice, were with him on the brief) for appellee.

• Before Sanborn, Woodrough and Thomas, Circuit Judges.

Thomas, Circuit Judge, delivered the opinion of the
court.

This is an appeal from a judgment entered in condemna-
tion proceedings brought by the United States to obtain
flowage rights over certain tracts of land located in Mis-
sissippi and New Madrid Counties, Missouri, pursuant to
the provisions of the Mississippi Flood Control Act of
May 15, 1928, 45 Stat. 534, 33 U. S. C. A. §702a et seq. The
[fol. 223] appellant, claiming ownership of 1033.56 acres
designated in the record as Tract No. 243, seeks to contest
the award of \$17,921.70 reported by the commissioners and
confirmed by the district court as damages for the con-
demnation of a flowage easement over this tract on the
ground that the damages should have been determined to
be \$31,681.98 in accordance with the terms of a contract
previously executed by the parties.

The provision of the Act of May 15, 1928, pertinent to
this appeal is as follows: "The Secretary of War may
cause proceedings to be instituted for the acquirement by

condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States District Court for the district in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price," etc., 33 U. S. C. A. §702d.

Acting under the authority of this statute and in accord with a Presidential Proclamation of December 11, 1928, the Secretary of War directed that offers for flowage easements be made to owners of land within the Birds Point-New Madrid Floodway project on the West side of the Mississippi River opposite Cairo, Illinois. This order was transmitted through the regular military channels and accordingly the following letter was sent to the appellant.

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932.

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

[fol. 224] To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100 Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer."

The appellant accepted this offer on March 2, 1932, having been granted an extension of time to March 15, 1932, in which to make his decision. On July 8, 1932, Major Somervell wrote to the appellant saying: "It is regretted that after a careful review of the question of flowage over these tracts it was found that the prices first suggested could not be properly recommended to the court. It is not feasible for this office to recommend for an agreed verdict [fol. 225] prices in excess of what are considered fair and reasonable prices by higher authority. As all flowage cases are to be presented to the court, this office is confident that just compensation will be awarded in all cases." This letter was written as a result of the issuance of an order by the Secretary of War on April 7, 1932, that certain offers, including that made to the appellant, should be withdrawn for the reason that they were considered greatly in excess of actual values.

On September 25, 1933, the United States filed this suit seeking condemnation of flowage rights over the lands of

the appellant and others, alleging inability to agree with the defendant claimants upon the compensation to which they were entitled and praying that the court appoint disinterested commissioners to assess and award the damages occasioned by the easement. Throughout the subsequent proceedings in the court below the main contention of the appellant was that in so far as the issue of damages in respect of Tract No. 243 was involved in this action it had been previously determined by the contract between the parties, hereinbefore set out. This contention was urged to the court in the form of exceptions to the various awards reported by the commissioners, by motion to vacate the awards and to enter judgment in favor of the appellant in the sum of \$31,681.98, with interest from the time of taking, and by an answer and "counter-claim" setting forth the facts relative to the prior contract between the parties with a tender of title to the flowage easement upon condition that the United States pay \$31,681.98 into court and with a prayer that the court enter judgment in that sum. The trial court ruled adversely to the appellant's contention in every form in which it was raised.

The errors assigned by the appellant relate almost exclusively to the court's failure to enter judgment for the amount agreed upon in the contract between the parties. No question is raised as to the right of the Government to condemn the easement or to the regularity of the proceedings below aside from the contention that the court was without jurisdiction to appoint commissioners to assess the damages, that the commissioners were without jurisdiction to assess an amount different from that agreed upon in the contract with the Government and that the court should have entered judgment for that sum.

[fol. 226] In this appeal the appellant continues to urge that he was entitled to have his damages determined under the prior agreement with the Government and that the lower court was in error in appointing commissioners to make an assessment based upon actual values. On its part the Government admits that a valid and binding contract to purchase the flowage easement involved for \$31,681.98 was entered into with the appellant and subsequently repudiated. It contends, however, that sovereign immunity

from suit deprived the trial court of jurisdiction to render an affirmative judgment on a contract claim of this amount; that the appellant must pursue his remedy in the Court of Claims; and that in condemnation proceedings the court is limited to the procedure defined by the statute.

The most persuasive aspect of the appellant's argument is his contention that no separate claim is being asserted against the government. He observes that compensation in some amount was contemplated under the Fifth Amendment and the Flood Control Act of May 15, 1928; and that in this case the court was not required to determine the exact extent of the damages or to appoint commissioners for that purpose but merely to enter judgment in the amount determined by the previous agreement of the parties. But however appealing that argument is and however desirable it may be to determine all related issues in one proceeding the conclusion can not be escaped that the appellant's contention is founded upon an attempt to enforce a contractual obligation of the United States and necessarily involves the question of the jurisdiction of the district court to determine the issue and enter judgment.

It is the settled rule that a sovereign state cannot be sued without its consent, and this is true whether the issue is raised by direct suit or otherwise. *Nassau Smelting Works vs. United States*, 266 U. S. 107; *Ill. Central R. R. Co., vs. Public Utilities Comm.*, 245 U. S. 493; *Davis vs. O'Hara*, 266 U. S. 314; *Bigby vs. United States*, 188 U. S. 401; *North Dakota-Montana W. G. Ass'n. vs. United States*, 8 Cir., 66 F. (2d) 573. The jurisdiction of a federal court to entertain claims against the United States must depend upon a specific act of Congress unless the Government places itself in the position of a private suitor and thereby [fol. 227] impliedly consents to abide by an adverse determination of the issues involved. *Bull vs. United States*, 295 U. S. 247; *Nassau Smelting Works vs. United States*, *supra*; *Keifer & Keifer vs. Reconstruction Finance Corp.*, 8 Cir., 97 F. (2d) 812; *North Dakota-Montana W. G. Ass'n. vs. United States*, *supra*; *United States vs. Skinner & Eddy Corporation*, 9 Cir., 35 F. (2d) 889; *Schroeder vs. Davis*, 8 Cir., 32 F. (2d) 454; *United States vs. The Thekla*, 266 U. S. 328; *The Paquete Habana*, 189 U. S. 453; *The Gloria*, 286 F. 188; *Carr vs. United States*, 98 U. S. 433;

The Siren, 7 Wall. 152; United States vs. National City Bank of New York, 2 Cir., 83 F. (2d) 236; United States vs. Stephanidis, 41 F. (2d) 958.

The appellant does not rely on specific statutory authority to support his contention. In fact he is forced to avoid the limitations of the Tucker Act which establishes jurisdiction in the district courts concurrent with the Court of Claims to hear certain classes of claims against the United States. Section 24 of the Judicial Code, 28 U. S. C. A. §41 (20), provides that "The district courts shall have original jurisdiction as follows: * * *".

"Concurrent with the Court of Claims, of all claims not exceeding \$10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *"

It is at once manifest that had the United States chosen not to institute condemnation proceedings against the appellant's property his only recourse would have been to assert a right of recovery in the Court of Claims for damages for the breach of the contract to purchase a flowage easement. The Government, however, has instituted condemnation proceedings and the appellant strenuously urges that by so doing it has submitted itself to the jurisdiction of the district court to hear and determine all claims related to the subject matter of the suit.

[fol. 228] It is true that it has been held that when the Government comes into court to enforce a claim it comes not as a sovereign but as a suitor and thereby submits to the court's adjudication of just claims relating to the subject matter involved even to the extent of becoming subject to an affirmative judgment; and this in spite of the fact

that the court has no express statutory authority to enter such a judgment. *United States vs. The Thekla*, supra; *The Paquete Habana*, supra; *The Siren*, supra; *The Nesra Senora De Regla*, 108 U. S. 92; *The Gloria*, supra. The rule has been thus broadly stated in decisions in admiralty, perhaps arising out of the necessity of determining intricate problems of liability in prize and collision cases in one action. See *The Gloria*, 286 F. 188, 203. But we have not been referred to any decision outside of admiralty in which the rule has been given the scope of permitting a defendant to recover an affirmative judgment in a suit instituted by the United States. Its application has been limited to the extent of permitting the defendant to assert a right of recoupment, set-off or counterclaim not exceeding the amount of the Government's claim and arising out of the same transaction or subject matter. *Bull vs. United States*, supra; *Gratiot vs. United States*, 15 Pet. 336; *United States vs. National City Bank of New York*, supra; *United States vs. Stephanidis*, supra; and see *United States vs. Guaranty Trust Co. of New York*, 2 Cir., 91 F. (2d) 898. In these cases it is frequently stated that the United States enters court as a private suitor and the rules applicable to individuals apply. See *Bull vs. United States*, 295 U. S. 247, 261, *The Thekla*, 266 U. S. 328, 340; *United States vs. National City Bank of New York*, 2 Cir., 83 F. (2d) 236, 238.

Two considerations bar the appellant's contention that this principle is applicable in the instant case. The first is that in the exercise of the right of eminent domain the United States is asserting a privilege inherent solely by virtue of sovereign power. *Kohl vs. United States*, 91 U. S. 367; *United States vs. Lynah*, 188 U. S. 445. In instituting proceedings to condemn an easement over the appellant's property it can not be said that the Government entered court as a private suitor. It entered court to condemn property for a public use in the exercise of its sovereign power and in no way laid aside its protective cloak of immunity from suit. The second consideration, is that the appellant is not attempting to assert a claim in opposition [fol. 229] to a money demand brought against him but is seeking to have his damages in a condemnation suit determined according to his contract with the Government

rather than by the mode provided by the statute, *supra*. This contention clearly amounts to an attempt to enforce the contract in this proceeding. The trial court had no jurisdiction to entertain his demand.

These conclusions do not conflict with the decision in *Wachovia Bank and Trust Co. vs. United States*, 4 Cir., 98 F. (2d) 609, the holding in which the appellant insists is determinative of the issue in the instant case. In that case the United States instituted proceedings to condemn a certain tract of land. Appraisers were appointed who fixed the value of the land at \$8.50 per acre. The court overruled the owner's exceptions to their report and entered an order condemning the property. On appeal the court found that the parties had completed an option contract, somewhat similar to the contract before this court, fixing the value of the land at \$8.50 per acre. Accordingly it was held that the defendant vendor was bound by the contract price, the court stating that while the commissioners in the condemnation proceedings were not bound by that price a party to the option could not complain that the price fixed therein was adopted by the commissioners. For that decision to be in point in this case it would have been necessary for the Government to have complained that the commissioners had adopted a value higher than the price fixed by the contract between the parties. But even assuming that the *Wachovia* case holds that in a situation similar to the one here presented the Government was enabled to hold the condemnee to his contract it does not follow that the converse of that proposition is true. The Government, in asserting its rights, is not bound by the same restrictions that hamper individual litigants. If a claim against the Government exceeds a certain amount the only forum open to the claimant may be the Court of Claims.

The appellant contends that he is entitled to receive interest from the time of the taking. See *Jacobs vs. United States*, 290 U. S. 13; *Seaboard Airline R. Co. vs. United States*, 261 U. S. 299; *Shoshone Tribe vs. United States*, 299 U. S. 476. The Government concedes this to be the rule but contends that the point has not been properly preserved in the appellant's assignment of errors since the [fol. 230] request to the lower court for interest is linked

with that for entry of judgment in the amount set out in the contract between the parties; the argument is that the United States is not liable for interest on a contract claim unless a contrary intention is indicated in the contract itself or by statute. The appellant is clearly entitled to interest as part of his damage and while he has not preserved that point as carefully as he might have done his requests to the court appear to have been made in that connection and it is immaterial that they were incident to his demands for recognition of the contract claim.

It remains to determine the date of the taking. The evidence is undisputed that the set-back levee was started by the Government on October 21, 1929, and that it was 98.9 per cent completed on October 31, 1932. Since the latter date no further work aside from repairs has been done on it and the project was actually placed in operation and the land flooded in 1937. We have not been referred to any case in which the issue was distinctly raised of whether a taking occurs at the time the work is started or when it is completed so far as the right to interest is concerned. The dictum in Hurley vs. Kincaid, 285 U. S. 95, 103, that the taking occurs as soon as the Government begins to carry out the authorized project appears to receive support in the cases cited. See also Shoshone Tribe vs. United States, supra. It follows that interest should have been allowed from October 21, 1929, to the date of judgment. The order is that the judgment be modified accordingly, and as so modified affirmed.

Modified and affirmed.

[fol. 231] (Judgment, March 6, 1939.)

(Vacated by order of March 24, 1939.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1938.

Thursday, March 6, 1939.

William H. Danforth, Appellant,
No. 11255. vs.
United States of America.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, modified to allow interest from October 21, 1929, to the date of said judgment, and as thus modified the said judgment is affirmed without the taxation of costs to either party in this Court.

March 6, 1939.

[fol. 232] In the United States Circuit Court of Appeals
for the Eighth Circuit.

William Danforth, Appellant,
No. 11255 vs. At Law
United States of America, Appellee.

On Appeal from the District Court of the United States
for the Eastern District of Missouri.

Petition of the United States for Rehearing and Brief in
Support Whereof.

Petition for Rehearing.

To the Honorable Judges of the United States Circuit
Court of Appeals for the Eighth Circuit:

Comes now the United States of America, appellee in the above-entitled cause, and presents this petition for a rehearing upon the following holding of this Court:

It remains to determine the date of the taking. The evidence is undisputed that the set-back levee was started by the Government on October 21, 1929, and that it was 98.9 percent completed on October 31, 1932. Since the latter [fol. 233] date no further work aside from repairs has been done on it, and the project was actually placed in operation and the land flooded in 1937. We have not been referred to any case in which the issue was distinctly

raised of whether a taking occurs at the time the work is started or when it is completed so far as the right to interest is concerned. The dictum in *Hurley vs. Kincaid*, 285 U. S. 95, 103, that the taking occurs as soon as the Government begins to carry out the authorized project appears to receive support in the cases cited. See also *Shoshone Tribe vs. United States*, *supra*. It follows that interest should have been allowed from October 21, 1929, to the date of judgment. The order is that the judgment be modified accordingly, and as so modified affirmed.

The petitioner respectfully shows that the question on which a rehearing is sought has never been adequately presented to the Court. Throughout the trial in the lower court the appellant's claim for interest was linked with his request for entry of judgment in the amount of the contract. The appellant never contended that he was entitled to interest as a part of the just compensation guaranteed him by the Constitution. Hence the Government did not have occasion to make a complete record on the question of a taking. The appellant's assignments of error likewise linked his claim for interest with his claim upon the contract. For these reasons the Government took the position in its brief that the appellant had not properly preserved the question of his right to interest (other than on the contract) and no argument was made with reference to a taking.

This Court has decided that the appellant has sufficiently, although not as carefully as he might, preserved the question of his right to interest as a part of just compensation. The Government is now seeking a rehearing solely on the questions of whether there has been a taking and, if so, when the taking occurred. The grounds for a rehearing are that the following material matters of law and fact were inadvertently overlooked by the Court in deciding that a taking occurred on October 21, 1929:

1. It appears from the opinion that the Court inadvertently interpreted an assumption made by Mr. Justice Brandeis in *Hurley vs. Kincaid*, 285 U. S. 95, 103-104, to be a dictum.

2. The Court did not consider the decision of the Court of Claims in *Matthews vs. United States* (No. 42408, de-

cided May 31, 1938) which is in direct conflict with the decision in the instant case.

3. The Court inadvertently overlooked pertinent provisions of the Flood Control Act.

Wherefore, for the foregoing reasons, and because of the importance and far reaching effects of the decision, [fol. 235] the petitioner respectfully requests that a rehearing be granted.

Respectfully submitted.

CHARLES E. COLLETT,
Acting Assistant Attorney General.

C. W. LEAPHART,
Special Assistant to the Attorney General.

L. JOHN WEBER,
Special Attorney, St. Louis, Mo.

CHARLES R. DENNY, JR.,

THOMAS E. ERVIN,

Attorneys,
Department of Justice, Washington, D. C.
Certificate of Counsel.

I, Charles R. Denny, Jr., counsel for the appellee in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

CHARLES R. DENNY, JR.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Mar. 20, 1939.

[fol. 236] (Order Granting Petition of Appellee for
Rehearing, etc.)

March Term, 1939.

Friday, March 24, 1939.

The petition for rehearing filed by counsel for appellee seeking a reversal solely on the question of whether there has been a taking, and if so, when the taking occurred, having been considered, It is ordered by this Court that the said petition, be, and is hereby, granted, but limited solely to a determination of the date of taking.

It is further ordered by this Court that the judgment heretofore entered on the opinion filed in this cause March 4, 1939, be, and it is hereby, vacated, set aside and held for naught.

This cause for the hearing of the aforesaid question is set down for Friday, May 12, 1939, at St. Paul, Minnesota, following the cases now set for hearing on that day.

March 24, 1939.

[fol. 237] (Order of Submission.)

May Term, 1939.

Friday, May 12, 1939.

9. (Before Judges Sanborn, Thomas and Sullivan.)

This cause came on to be heard in pursuance of the order of this Court granting petition of appellee for a rehearing, and argument was commenced by Mr. J. L. London for appellant, continued by Mr. Thomas E. Harris, Attorney, Department of Justice, for appellee, and concluded by Mr. J. L. London for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 238] (Opinion on Second Submission.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,255.—MAY TERM, A. D. 1939.

William H. Danforth,

Appellant,

vs.

United States of America,

Appellee.

} Appeal from the Dis-
trict Court of the
United States for the
Eastern District of
Missouri.

[July 11, 1939.]

On Petition for Rehearing

Mr. J. L. London (Messrs. Leahy, Walther, Hecker & Ely were with him on the brief) for appellant.

Mr. Thomas E. Harris, Attorney for the Department of Justice, (Mr. Charles E. Collett, Acting Assistant Attorney General, Mr. C. W. Leaphart, Special Assistant to the Attorney General, Mr. C. R. Denny, Jr., and Mr. Jacob N. Wasserman, Attorneys for the Department of Justice, were with him on the brief) for appellee.

Before SANBORN and THOMAS, Circuit Judges, and SULLIVAN, District Judge.

THOMAS, Circuit Judge, delivered the opinion of the court.

On Petition of the Government we granted a rehearing limited to the single question of whether a taking of the appellant's property has resulted from the operations of the Government in carrying out the provisions of the Mississippi Flood Control Act of May 15, 1928, (33 U. S. C. A. 702a et seq.) and if so the date upon which the taking occurred.

The argument, as originally presented, centered around the appellant's contention that in the proceedings brought by the Government to condemn a flowage easement over his land the lower court was in error in refusing to assess the damages in accordance with the amount fixed by a contract previously executed between the Government and the appellant. We held that the appellant's contention could not be sustained. *Danforth v. United States*, 102 F. (2d) 5. That issue is not now involved.

As a subordinate issue, however, the appellant urged that he was entitled to interest from the date of the taking to the date of judgment as a part of his award. He contended that a taking had occurred on October 21, 1929, the date upon which the Government began the construction of the set-back levee; or, if not on that date, then on October 31, 1932, the date upon which the set-back

levee was substantially completed. The Government contended that the question of interest on the award was not raised and did not argue it. We concluded that, while the point was not as carefully preserved as might have been done, it was properly before us and that interest should have been allowed from October 21, 1929, the date of taking as fixed by the beginning of work on the set-back levee.

In support of its petition for a rehearing the Government insisted that a taking of the property had not, at any time, become an established fact and that the appellant was therefore not entitled to an award of interest. In order to determine the issue it will be necessary to sketch briefly the outlines of the flood control project at this point on the Mississippi and its progress at the time of the trial in the lower court.

The appellant's property lies in the alluvial valley extending along the Mississippi River from Cape Girardeau, Missouri, to the Gulf of Mexico. The tract includes more than 1000 acres and is situated in Mississippi County, Missouri, a few miles inland from the west bank of the river. It lies about half way between Birds-point and New Madrid, Missouri. Except for a few acres the land will not be affected by the backwater of the river in times of high water. With this exception the entire property is suitable for cultivation. At intervals in the past however, like other lands in the valley, this tract has been subjected to the overflow of the headwaters of the river in periods of flood. To secure protection from these periodical floods various local interests have been engaged for a number of years in constructing levees along the banks of the river. Certain of these levees have been constructed under the supervision of the Mississippi River Commission created by the Act of Congress of 1879, and the United States has contributed a share of the necessary expense as an aid in achieving a continuous levee system where needed. See *Jackson v. United States*, 230 U. S. 1. At the point of the river under consideration the riverside levee starts at the hills near Commerce, Missouri, and follows the west bank of the river down to a point near New Madrid, Missouri. Between these points the levee varies in height from 10 to 20 feet with an average height of approximately 15 feet. It has been maintained at that height for a number of years and will, if adequately sustained in floodtime, prevent the overflow of the headwaters of the river so long as they do not rise above 58 feet as measured on the gauge at Cairo, Illinois. According to previous records this levee would provide adequate protection to land of the elevation

of that of appellant's tract except when such floods as those of the years 1912, 1913, 1927 and 1937 occurred. The floods of 1912, 1913 and 1927 exceeded 57½ feet and it is probable that they could have been prevented from passing over the levee only by the exercise of great care and labor. The flood of 1937 exceeded the highest stage reached in recorded history over a period of some 80 years and could not have been prevented from overtopping the levee even by extraordinary methods of maintenance.

On May 15, 1928, Congress adopted the Mississippi River Flood Control Act, supra, based on a report commonly known as the Jadwin Plan. We have recently had occasion to refer to the pertinent parts of that Act in *Sponenbarger v. United States*, 8 Cir., 101 F. (2d) 506, and it is unnecessary to review them here. It will be sufficient to state that in general the Flood Control Act contemplates the construction of lateral floodways adjacent to certain sections of the Mississippi River through which the excess waters may be diverted in flood periods in order to relieve the main channel of water that it cannot carry. The theory of the plan is that a large portion of the lands now subject to overflow will receive complete protection if the flow of the surplus flood water is confined within the limits of floodways built at certain strategic points along the river.

The Birdspoint-New Madrid Floodway is one of the projects included in the plan. Beginning on the north at Birdspoint, Missouri, the outer or western limit of the floodway is defined by a set-back levee. This levee includes many thousands of acres of land between it and the riverside levee. It was substantially completed on October 31, 1932. It is, however, only one essential element in the plan. The riverside levee remains at its original height and offers the same protection against overflow that it has since it was originally constructed. To complete the plan upper and lower fuse plug sections are to be created in the riverside levee. The upper fuse plug will be made by reducing the height of the riverside levee about 3 feet for a distance of eleven miles below Birdspoint, Missouri, in order to permit the excess flood waters to flow into the floodway whenever the river reaches a stage of 55 feet on the Cairo gauge. By a similar reduction in the height of the levee for a distance of about five miles above New Madrid, Missouri, the water will return to the main channel. A drainage system is to be constructed at this point to empty the floodway when the flood subsides. Since the lands within the floodway now enjoy protection against floods of an average height

of 58 feet on the Cairo gauge they will be subjected to the hazard of more frequent overflow upon the reduction of the fuse plug sections.

The appellant's land lies in the floodway; the completed set-back levee proceeds along the western border of his land a strip of which was condemned by the Government for that purpose. He does, however, enjoy the same use of his land that he has always had. As the project now stands, and as it has stood since the completion of the set-back levee in 1932, the only possible result of the operations of the Government to date is that a flood of sufficient height to flow over the riverside levee will be confined within the limits of the floodway thereby increasing the depth of the water covering appellant's land. According to the testimony the probable effect will be an increase in the damage to the buildings and other structures on the property. The 1937 flood did go over the riverside levee but the record does not indicate whether any increased damage actually resulted.

Section 4 of the Act (33 U. S. C. A. 702-D) directs that "the United States shall provide flowage rights for *additional* destructive flood waters that will pass *by reason of diversion from the main channel* of the Mississippi River; . . . The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project." (Italics supplied).

It does not follow, however, that the increased depth of water to which the appellant's lands will be subject upon the completion of the set-back levee is the "additional destructive floodwaters" referred to in the Act. We do not so construe it.

The act was obviously intended to provide for flowage easements in those cases where the operations of the Government will actually result in the hazard of a more frequent diversion of flood water from the river over the lands involved in the project. The appellant's land will be subject to this hazard upon the completion of the fuse plugs contemplated by the plan. A flowage easement over his land was accordingly sought and his damages assessed. But it is obvious that the set-back levee does not tend to divert any additional water from the main channel of the river; and the Government cannot be held to have taken the appellant's property merely by reason of its construction. It in no way deprived him of any of the rights attributable to his ownership of the

property. He enjoys identically the same protection from overflow that he has always had. The mere fact that the effect of the set-back levee may be to increase the depth of the water on a part of his premises in the event of a major flood is an incidental consequence for which the Government cannot be held liable. See *Bedford v. United States*, 192 U. S. 217; *Jackson v. United States*, 230 U. S. 1; *Sanguinetti v. United States*, 264 U. S. 146; *Gibson v. United States*, 166 U. S. 269; *Matthews v. United States*, Ct. of Cl. (Decided May 31, 1938).

The appellant contends that upon the practical completion of the set-back levee in 1932 the Government was in a position to put the floodway into operation at any time thereafter, and that this right constituted a taking of his property. His theory is that the Government could dynamite the riverside levee at will and achieve the same result as it would had it actually completed the construction of the fuse plugs. We are not referred to any authority for this proposition other than the fact that Government officers actually did dynamite the levee during the flood of 1937 although at the time the charges were exploded the river had already broken natural crevasses in the riverside levee and the only effect appears to have been a hastening of an otherwise inevitable flow of water into the floodway. It is true that in the *Sponenbarger* case, *supra*, we referred to the fact that the Jadwin Plan provided that the fuse plug there involved might be "blown" or crevassed if found necessary to hasten diversion. Assuming that the same provision is applicable here it does not follow that the Government may rightfully place the floodway in operation by dynamiting the existing levee prior to its completion of the fuse plug sections. Section 1 of the Act (33 U. S. C. A. § 702a) provides "That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway" The appellant does not contend that the acts of the Government officers in dynamiting the levee in 1937 constituted a taking of his property on that date but merely that it indicated the Government's view of its right to place the floodway in operation. The Government contends that acts of these officers were not authorized by their superiors. In any event their acts cannot prevail over the plain mandate of the statute, and we are inclined to attach but little importance to them since they were done in the midst of the pressing emergency and at a time when the appellant's land was subject to an inevitable overflow.

In an effort to bring himself within the scope of the Sponenbarger case the appellant argues that the landowners in this floodway have been deprived of their right of "self-defense", that is, their right to raise the existing riverside levee and thereby gain additional protection from such floods as may occur in the future. No authority is cited for the argument. So far as it appears in the record the title to the riverside levee remains in the existing local levee districts, and we find nothing in the Flood Control Act to prevent the raising of the levee at any time prior to the construction of the fuse plug sections. The situation is materially different from that in the Sponenbarger case where we were of the opinion that under the terms of the Act the United States had assumed dominion over the riverside levee. A fuse plug section had already been created in that case by raising the riverside levee above and below and on the opposite bank of the river. The Government having thus taken control and completed the upper fuse plug, the owners of land in the floodway were deprived of their right of "self-defense" against threatened flood. In the instant case it does not appear that the Government has assumed dominion over the riverside levee. It may do so at some future date or it may abandon the entire project.

Upon a reconsideration of the facts and of the law we reach the conclusion that appellant's land will not be taken within the meaning of the Act until the upper fuse plug in the riverside levee shall be opened and the land is exposed to "additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River." The result is that the judgment appealed from is

Affirmed.

[fol. 245] (Judgment, July 11, 1939.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1939.

Tuesday, July 11, 1939.

William H. Danforth, Appellant,

No. 11255. vs.

United States of America.

Appeal from the District Court of the United States for
the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri after granting of petition of appellee for a rehearing, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

July 11, 1939.

[fol. 246] (Motion of Appellant for Stay of Mandate.)

Comes now appellant in the above entitled cause and moves the Court to stay the mandate in the same, and as grounds for said motion states that appellant is preparing and will file an application for writ of certiorari to the Supreme Court of the United States in the above matter.

WILLIAM H. DANFORTH,
Appellant.

By J. L. London,
Attorney.

State of Missouri,
City of St. Louis—ss.:

J. L. London, of lawful age, being duly sworn upon his oath states that he is attorney of record for appellant; that he is now working on and preparing a petition for writ of certiorari to the Supreme Court of the United States; and further states that the above motion is not made for vexation or delay, but in order to preserve the proper status of the above case until a final determination by the said Supreme Court of the United States.

J. L. LONDON.

Subscribed and sworn to before me this 20th day of July,
1939.

HORTENSE GANNON,
Notary Public.

(Seal)

My commission expires 2/12/41.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jul. 21, 1939.

[fol. 247] (Order Staying Issuance of Mandate.)

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Dated July 24, 1939.

ARCHIBALD K. GARDNER,
U. S. Circuit Judge.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jul. 26, 1939.

[fol. 248] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein William H. Danforth was Appellant and the United States of America was Appellee, No. 11255, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name, and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirty-first day of July, A. D. 1939.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 156.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

(4234)

MICRO CARD

TRADE

MARK



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